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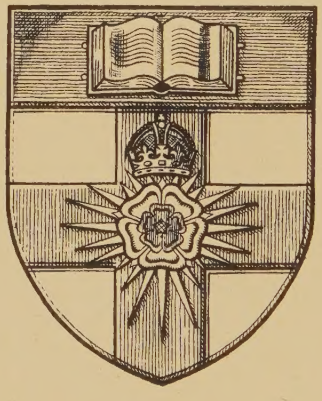

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

METROPOLITAN WATER BOARD *v.* DICK, KERR & CO.

K. B. D. 1916 *July* 26, 27, 28, 31; *Oct.* 18.

C. A. 1917 *Feb.* 14, 15, 16, 21, 22; *March* 5.

Contract—Construction of Reservoir—Time fixed for Completion—Stoppage of Works by Minister of Munitions—Whether Contract terminated or suspended—Plant brought on to Premises by Contractor—Power of Minister to order Sale of—Defence of the Realm Regulations Consolidated, reg. 8A *(b).*

The defendants in July, 1914, contracted with the plaintiffs to construct a reservoir, which was to be completed in six years, subject to a proviso that if by reason of any impediment the defendants were delayed in the completion of the works the plaintiffs' engineer might extend the time. By the terms of the contract all plant brought by the defendants on to the site of the works was to become the property of the plaintiffs and was to so continue until the completion of the works. By reg. 8A of the Defence of the Realm Regulations Consolidated the Minister of Munitions was empowered to restrict the carrying on of any work in any factory and to "remove the plant" from any factory "with a view to

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increasing the production of munitions in other factories." In February, 1916, the Minister of Munitions ordered the defendants to cease work on the reservoir, and directed them to remove a large portion of the plant then on the site and to sell it on his behalf to the owners of certain munition factories, which was accordingly done. Under these circumstances the defendants claimed that by reason of the stoppage of the works by the Minister's order, as the period of the war during which the stoppage would presumably continue was of indefinite duration, it became commercially impracticable to complete the work within the contract time, and therefore the contract was at an end. The plaintiffs claimed that the contract was only suspended, and further that the sale of the plant removed was without authority, and that they were entitled to the proceeds of the sale :—

Held by Bray J. : (1.) That the contract was not terminated but suspended only ; that, even if it were to be read as subject to an implied condition that if the delay were so great as to frustrate the object of the contract the contract was to be treated as determined (a question which the judge declined to decide), the object was not in fact frustrated. The object of the plaintiffs was to get a permanent reservoir, and it was only of secondary importance that they should have it completed within the stipulated time.

(2.) The power of the Minister of Munitions under reg. 8A (*b*) to remove plant with the view of increasing the production of war material in other factories involved a power to sell it to such factories ; and that the plaintiffs consequently were not entitled to recover the proceeds of sale of the plant removed.

Held, on appeal, that the effect of the order of the Minister of Munitions was to render the performance of the contract illegal and impossible during a period, the duration of which was so indefinite that it could not be regarded as a temporary interruption which might be met by an extension of time under the proviso ; that an implied term must be read into the contract that the obligation of performance should cease in the event of the Executive Government making performance illegal and impossible ; and that the object of the contract was frustrated and the contract determined.

Decision of Bray J. on this point reversed.

TRIAL of action before Bray J.

By a contract dated July 24, 1914, as amended by a supplemental contract dated May 10, 1915, the defendants agreed to construct for the plaintiffs a large reservoir at Littleton in the county of Middlesex for a price of 673,000*l*. By the terms of the contract the reservoir was to be completed within six years from the date of commencement of the work, and time was to be considered " as of the essence of the contract on the part of the contractor," provided

(clause 32) that if by "reason of any difficulties or impediments . . . . whatsoever or howsoever occasioned the contractor shall in the opinion of the engineer (whose decision shall be final) have been unduly delayed or impeded in the completion of this contract" it should be lawful for the engineer to extend the time, "and every such extension of time shall be deemed to be in full compensation" for any damage caused to the contractor by such delay. The contract further provided by clause 6 that the contractors were to provide all plant and labour necessary for the contract; and by clause 10 that "The plant tools and materials provided by the contractor shall from the time at which they respectively may be brought upon the site of the said works or the lands of the Board, and during the construction and until the completion of the said works, become and continue the property of the Board, and the contractor shall not remove the same or any part thereof without the consent in writing of the engineer." By clause 28 the contractors were to make good any loss or damage arising to the works or plant by any accident; and by clause 42 they were to be advanced 50 per cent. of the value of the plant, such advances to be repaid at the rate of 5 per cent. per month by deduction from monthly certificates. The works were commenced on August 16, 1914. By the beginning of 1916 the defendants had made insufficient progress with the works owing to the difficulty of getting enough labour, and it had become impracticable for them to finish the work within the contract time.

By reg. 8A of the Defence of the Realm Regulations Consolidated, "It shall be lawful for . . . . the Minister of Munitions . . . . (*b*) to regulate or restrict the carrying on of any work in any factory workshop or other premises . . . . or to remove the plant therefrom, with a view to maintaining or increasing the production of munitions in other factories." Acting under the powers thereby vested in him the Minister of Munitions on February 21, 1916, ordered the defendants to cease work upon the reservoir and to hold their plant and labour at the disposal of the Minister. By his directions the defendants removed a considerable portion of the plant and sold it to owners of munition factories, and received the proceeds to the amount of 46,000*l.* on behalf of the Minister. The defendants claimed that by reason of the stoppage of the works by the order of

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the Minister their contract with the plaintiffs had terminated, and that the property in the plant which was still on the site had revested in them. The plaintiffs then brought this action, claiming (1.) a declaration that the contract was still binding; (2.) a declaration that they were entitled to all the plant still on the site of the works, and to the proceeds of such as was sold; (3.) or alternatively, as to the plant removed and sold, damages for conversion; and (4.) an injunction against the removal of further plant.

Holman Gregory, K.C., and *Goodland*, for the plaintiffs. The contract was only suspended by the order of February 21, and is still subsisting. Therefore the plant still on the site remains the property of the plaintiffs, the works not having been completed. As to the plant removed from the site by the Minister's order and sold, the plaintiffs are entitled to recover from the defendants the proceeds of the sale by them, for the Minister had no authority under the Defence of the Realm Regulations to order its sale, but only its removal. He might lend it to munition factories, but was bound to restore it at the end of the war.

Hudson, K.C., and *Douglas Hogg*, for the defendants. By the interference of the Minister of Munitions the contract was determined. Its performance had been rendered impossible or commercially impracticable. The reservoir was to be built in six years and time was to be of the essence of the contract. The Minister by stopping the works and taking away the plant and selling it rendered it impossible for the defendants to finish the reservoir within the stipulated time. By his act the whole object of the contract was frustrated. It is true that by clause 32 the engineer was empowered to extend the time where the work was delayed by the causes therein specified; but that does not affect the position, and for two reasons —(1.) the clause only gave the engineer power to extend the time; it imposed no obligation on him to do so; and (2.) the interference by the Minister of Munitions was not an impediment which merely "delayed" the work; it was a total stoppage which brought it to an end. The impediments contemplated were such as would hamper the speed of execution of the work while still allowing the contractors to proceed with it. The stoppage would presumably continue during the period of the war, which would necessarily be of indefinite

duration, and with an indefinite stoppage there would be a natural destruction of plant and temporary works, such as trenches, cuttings, and embankments. The delay caused by the Minister's act was such as to go to the root of the contract and determine it, just as much as the detention of a ship in an enemy port on the outbreak of war was held in *Horlock* v. *Beal* (1) to determine a seaman's contract of service on board the ship. If the plant ever vested in the plaintiffs under the contract it revested in the defendants on the stoppage of the works. The determination of the contract was equivalent to the completion of the works. But in fact the plant never vested in the plaintiffs. In *Ex parte Collins* (2) it was held under a building contract in almost identical terms that plant brought on to the premises by the builder did not vest in the building owner. There as here there was a clause that the plant should not be removed by the builder without the architect's consent, which would have been wholly superfluous if the property in it had already vested in the building owner. With regard to the plant removed and sold, the Minister was empowered by reg. 8A to sell it. A right to remove must include a right to sell, and the defendants could justify under the Minister's order.

Holman Gregory, K.C., in reply.

At the close of the arguments the judge on July 31 gave an informal judgment to the following effect :—

1. Declaration that the contract between the plaintiffs and the defendants was still in existence and had not been determined.

2. That under clause 10 the property in all the plant brought by the defendants on to the site of the works had vested in the plaintiffs.

3. That the defendants were not liable to pay to the plaintiffs the 46,000*l.* received for the plant sold, on the ground that they sold it under the instructions of the Minister of Munitions and received the money on his behalf.

4. Injunction to restrain the defendants from removing any further plant or receiving the proceeds of any removed except as far as they do so as agents for the Minister of Munitions.

(1) [1916] 1 A. C. 486. (2) [1902] 1 K. B. 555.

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But he took time to consider the form in which the reasons for his judgment should be expressed.

Cur. adv. vult.

Oct. 18. BRAY J. read the following judgment :—This action was brought by the Metropolitan Water Board against Dick, Kerr & Co., Limited, who are large contractors for public works. The plaintiffs claimed a declaration that a certain contract for the construction of two reservoirs and works at Littleton in the county of Middlesex made between them and the defendants, and dated July 24, 1914, as modified by a supplemental contract dated May 10, 1915, was still in existence and binding on the defendants and had not been determined. They also claimed a declaration that they were entitled to certain plant, tools, and materials brought on to the site of the works by the defendants and the proceeds of sale of such as had been removed since February 21, 1916, or alternatively for damages for their conversion by the defendants, and an injunction to restrain them from removing any plant, tools, and materials from the site. The defendants as to the contract claimed that by a notice from the Ministry of Munitions dated February 21, 1916, in exercise of the powers conferred on it by the Defence of the Realm Acts and the Regulations made thereunder, the defendants were required to cease work, and by reason of such notice the performance of the contract became impossible and illegal, and the contract had ceased to be in existence as a binding contract ; and as to the plant, tools, and materials they denied that they were the property of the plaintiffs, and said, further, that they were dealt with by the defendants under the instructions of the Ministry of Munitions.

The works to be constructed under the original contract consisted of two reservoirs on a nearly flat area of land near the river Thames. Round this area there had to be constructed an embankment, in the centre of which was to be a puddle wall. The wall had to be carried down to the natural clay, which varied in depth. At the north-west corner this was at least seventy feet deep, but in other parts it was much shallower. The area inside the embankment had to be excavated, and formed the two reservoirs with a dividing wall between them. The two reservoirs covered a space of ground one and a half miles by nine-tenths of a mile, and the embankment was

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over six miles in length. It was a schedule of rates contract, and the total price to be paid by the Board for the work was 673,000*l.* The works were commenced on August 16, 1914. A large quantity of plant was brought on to the ground and installed by the contractors from time to time, and on May 10, 1915, the supplemental contract was entered into. By this the work was varied. Instead of two reservoirs there was to be only one occupying the same space as the two, and two inside embankments stretching partly across the area were to be constructed. By this contract the prices were revised mostly in favour of the contractors. The time for construction was not altered. At the time of the stoppage of the works the expenditure by the contractors, as stated by them, was—plant, 90,921*l.*; hauling and installation of plant and sundry other necessary works, 26,126*l.*; and permanent work, 56,395*l.* In respect of this the defendants had received under certificates of the engineer up to the end of 1915 about 40,000*l.* The permanent work consisted of a length of about 4000 feet of trench where it was shallow, 2080 feet of which had been filled in and completed, and the rest was in course of being excavated and filled in. At the north-west corner, which was the deepest part of the trench, the defendants had met with some difficulties. The upper twenty feet of the excavated trench was supported by timber and the lower part by steel piling consisting of steel sheets fifty feet in depth. A part of this had given way owing to the buckling of the steel sheets, and thus reducing the width of the trench to less than the seven feet provided for in the contract. The defendants had had further difficulties in procuring labour, in consequence of which less work had been done than should have been done to enable them to finish their contract within the six years, and on January 17, 1916, they wrote to Mr. Restler, the chief engineer under the contract, a letter which showed their position. The plaintiffs offered to meet them by granting an extension of time, but refused a revision of prices, and on February 1 the defendants wrote again. In that letter they said: "He fears it is only a matter of weeks before he will be forced to close down the work as most of their engineers are attested." On February 21 the following notice was sent by the secretary of the Ministry of Munitions to the defendants: "Gentlemen, I am directed by the Minister of Munitions to inform you that he has found it necessary

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to restrict the work which you are carrying out at Staines for the Metropolitan Water Board and the employment of workmen there, and to remove the plant therefrom, with a view to increasing the production of munitions elsewhere. I am therefore to inform you that in exercise of the powers conferred upon him by the Defence of the Realm (Consolidation) Act, 1914, the Defence of the Realm Amendment (No. 2) Act, 1915, and the Ministry of Munitions Order, 1915, the Minister hereby requires you forthwith to cease work on your contract for the Metropolitan Water Board. I am further to require you to comply with such instructions with regard to your plant and the labour at your disposal as may be conveyed to you on the Minister's behalf by Mr. John Hunter, Director of Factory Construction in the Ministry of Munitions. (Signed) H. Llewellyn Smith." On February 26 work at the reservoirs practically ceased, and between that date and the date of the trial, under the instructions of Mr. John Hunter, who was acting on behalf of the Minister of Munitions, the defendants removed and sold large quantities of plant. At the beginning of May the defendants set up the contention that the contract had been determined by reason of the further performance thereof having become impossible and illegal, and this action was then brought by the plaintiffs, who disputed this contention.

This most important question as to what circumstances will constitute a determination of a contract has been recently before the House of Lords in two cases of *Horlock* v. *Beal* (1) and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) In the latter case Lord Parker explained the principle which underlay all the cases in these words: "My Lords, in considering the question arising on this appeal it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition

(1) [1916] 1 A. C. 486. (2) [1916] 2 A. C. 397, 422.

inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency." I have, therefore, to examine the nature and the express conditions of this contract. The contract was for the construction of a very large work by the defendants. It had to be completed within six years from the date fixed by the engineer for the commencement of work, subject, however, to such extension of time as might be granted by him under the powers given him by the contract (see clause 32). Payment was to be made by the plaintiffs to the defendants on the certificates of the engineer in manner provided for in clauses 42 and 43. The important clause to be considered is clause 32. The first part of this clause deals with the time for completion. Then comes the proviso, which is in these words : " Provided always that if by reason of any additional works "—and then follow a number of details—" or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes or differences, whatsoever and howsoever occasioned, the contractor shall in the opinion of the engineer (whose decision shall be final) have been unduly delayed or impeded in the completion of this contract, it shall be lawful for the engineer, if he shall so think fit, to grant from time to time, and at any time or times by writing under his hand such extension of time either prospectively or retrospectively, and to assign such other day or days for, or as for, completion as to him may seem reasonable, without thereby prejudicing, or in any manner affecting, the validity of the contract, or the adequacy of the contract price, or the adequacy of the sums or prices mentioned in the third schedule ; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for and in respect of any and every actual or probable loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate him from any complaint or demand on the part of the Board for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been granted, but no further or otherwise, nor for or in respect of

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any delay continued beyond the time mentioned in such writing or writings respectively." The first question which arises under that is whether the event which happened here is provided for. In my opinion it is. I think the intention was to include every possible event (other than default of the contractor) which might unduly delay or impede the defendants in the completion of the contract, and the words " any difficulties, impediments . . . . whatsoever or howsoever occasioned " are quite wide enough to include the interference of the Minister of Munitions. No doubt this contract was entered into before the war, and I daresay the event of war did not enter into the minds of either of the parties ; nevertheless, if their intention was to include every difficulty or impediment, they must be held to have intended to include such a difficulty or impediment as has arisen here. I see no reason for giving these words anything but their natural construction. The defendants would naturally desire every possible protection against the penalty clauses, and the plaintiffs would desire protection against claims for compensation.

The question then arises whether, notwithstanding this event was provided for, if the delay was such as to frustrate the object of the contract, or to render its performance impossible, there should not be implied some such further proviso as this : " Provided that if the delays or impediments are so great as to frustrate the object of the contract, or make the completion thereof physically impossible or commercially impracticable, this contract shall be treated as determined." I can conceive that such a proviso might be implied, but as I did not call on Mr. Holman Gregory to reply I will not decide it ; I will assume it. Then I have to consider whether in the events that have happened the object of the contract has been frustrated or its completion rendered impossible or commercially impracticable. That seems to me to be a pure question of fact. It was argued that the length of the war is a thing so uncertain that that alone is sufficient. Lord Parker dealt with that in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1): " Further, even if it were permissible to imply such a proviso to the 20th condition, there is, in my opinion, no reason for holding that the Government will, in all reasonable probability, retain the vessel for the remainder of the term of the charterparty. Whether they will do so or not

(1) [1916] 2 A. C. 397, 427.

seems to me to depend on all sorts of circumstances as to which a Court of justice cannot speculate. They may do so or they may not. I do not think that one event is more likely than the other." I can conceive cases where uncertainty as to the length of the delay might frustrate the adventure, but why should a suspension for an uncertain time in a contract like this frustrate the object? Clause 32 includes strikes, which are always of uncertain length. The object is not frustrated merely by delay. The plaintiffs wanted a reservoir to last all time. It was, of course, important to them that there should be no undue delay beyond the six years, but they would eventually get the reservoir which was their object. The defendants wanted the opportunity of constructing the works for payment to them. They will get their opportunity and their payment, not as soon as they hoped, but they will get them. Mr. Hudson spoke of a delay of two years. Such a delay is possible, perhaps not improbable, because the delay will not only be during the war, but for a substantial period thereafter, as the plant has to be replaced; but why should a delay for two years frustrate the object of the contract? In my opinion such a delay, and even a longer delay, will not frustrate the object of the contract. Then is the completion of the works physically impossible? The suggestion made by Mr. Hudson was that the work which would have to be done would be a different work, and that work already done would have to be undone. Special reference was made to the deep trench at the north-west corner. It was said that after a long delay the steel piles could not be drawn, and then it was quite likely that the situation of the trench at this point would have to be altered. I had evidence from both sides as to this. I have come to the conclusion that the steel piles were not strong enough to make the sides of the trench secure. They had failed to do so, at all events, at one point, and even if the works had proceeded continuously there would have been a great danger of further failure. No doubt the stoppage of the work would increase that danger. What may have actually happened since the stoppage nobody can say now. The trench is, of course, full of water, and will remain so until the work is resumed. But suppose this whole length of 220 feet falls in, and the situation of the trench has to be altered, that, in my opinion, does not make the work a different work. The engineer has power to make alterations under the

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contract, and such alterations would include an alteration in the situation of the trench. The contract therefore contemplates such an alteration. This may increase the cost, but it is not different work. The same thing might have happened in the case of a long strike. It was said the shallow trench might suffer from the delay, but as to that I agree with Mr. Restler—I do not think it would substantially suffer. No doubt some work already done has been undone and will have to be done again. The site had been unwatered. It has now become full of water again, and must be unwatered again. That also would happen in the case of a strike, if pumping could not be continued. The engineer is empowered to grant an extension of time in respect of any delay caused by the matters I have mentioned. Mr. Hudson says he is only empowered, he is not bound to grant an extension. That is because the parties to the contract have agreed to accept him as the judge of whether any and what extension of time should be allowed. Then it was said that the plant would have to be replaced. That only means time and an expenditure of money. It does not render the work physically impossible. I cannot hold that the completion of the work contemplated by the contract is physically impossible. Then is it commercially impracticable? There will be considerable delay, and a certain loss of money if the defendants are not compensated by the Government. As to delay, it must be remembered that the defendants said on January 17, and I think said truly, that owing to the condition of the labour market they would probably have to stop the work. I think that it is at least as likely as not that the defendants will have been benefited by this compulsory stoppage, and that the state of the labour market may be improved at the end of the war. The replacing of the plant may occasion some loss, but they have received very high prices so far from the sale of the plant, and have been paid for the cost of dismantling and removing it. It is true that the Government are not bound to give the defendants compensation for any loss that they may have sustained by the stoppage, but Mr. Hunter, a witness called by them, said he presumed that a claim, if it was thought right, would be paid. I cannot conceive that they will not be compensated. But assume that the defendants will suffer a loss and a considerable loss, in money, what is the amount of such loss? The defendants have given no evidence to enable me to calculate it.

They have left me in the dark as to the amount. In my opinion it cannot for a moment be said that there will be any such loss as to make the completion commercially impracticable. I have come to the clear conclusion that, assuming such a proviso as I have suggested were to be implied, the defendants have completely failed to bring themselves within it. Mr. Hudson suggested a much wider proviso. I think the defendants have failed to prove that they came within that. I cannot hold that the stoppage has imposed on them obligations substantially differing from those in their contemplation when making the contract. In my opinion I must declare that the contract is not determined.

Now as to the plant, tools, and materials. I have been referred to several authorities, of which *Ex parte Collins* (1) and *Hart* v. *Porthgain Harbour Co.* (2) are the most important. I think this case clearly falls within the latter. I think clause 10 vests the property in all the plant, tools, and materials brought by the defendants on to the site in the plaintiffs until the completion of the works. If the contract is still in existence they certainly have not ceased to be required for its completion. I should have come to the same conclusion apart from authority. The words of clause 10 are quite clear: "The plant tools and materials provided by the contractor shall from the time at which they respectively may be brought upon the site of the said works, or the lands of the Board, and during the construction, and until the completion of the said works, become and continue the property of the Board, and the contractor shall not remove the same or any part thereof without the consent in writing of the engineer." I see no reason whatever why they should not be given their natural interpretation. *Ex parte Collins* (1) is quite distinguishable. The wording of the clause there is substantially different. I must hold, therefore, that the plaintiffs were on February 21, 1916, entitled to all the plant, tools, and materials which were then on the site of the works. The next question is whether the plaintiffs are entitled to the proceeds of the sale of this plant, or to damages for the conversion of such portions of it as have been removed by the defendants since February 21, 1916. There is no doubt that the defendants have removed, and have either sold or leased plant, tools, and

(1) [1902] 1 K. B. 555. (2) [1903] 1 Ch. 690.

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materials (substantially it is all plant) to the value of about 50,000*l.*, and have already received about 46,000*l.* as the proceeds of sale. The defendants say that in so removing and selling or leasing them they acted under the instructions of Mr. Hunter, who was representing the Minister of Munitions. I think the defendants have proved that they did so. I see no reason to doubt the truth of Mr. Hunter's and Mr. McKay's evidence on that point. But then Mr. Holman Gregory denied that the Minister of Munitions had power to sell them. That depends on reg. 8A (*b*) of the Regulations made under the Defence of the Realm Acts: "It shall be lawful for the Admiralty or Army Council or the Minister of Munitions . . . . (*b*) to regulate or restrict the carrying on of any work in any factory workshop or other premises, or the engagement or employment of any workman, or all or any classes of workmen, therein"—stopping there, Mr. Gregory said he did not contend that these words did not justify the Minister of Munitions in stopping the work, but the section proceeds "or to remove the plant therefrom, with a view to maintaining or increasing the production of munitions in other factories workshops or premises, or to regulate and control the supply of metals and material that may be required for any articles for use in war." He contended that that did not authorize a sale. I think that those words do authorize a sale. They expressly authorize a removal to other premises with a view to maintaining or increasing the production of munitions. That was the object with which this plant was removed. Was the Minister of Munitions only entitled to give them or lend them without payment to the owners of the other factories? This cannot be; he must be entitled to receive payment for them, and if so he must be entitled to sell them. There is no provision for their being returned to the original owners. I think when the whole of the Regulations are looked at they show that the intention was that the Minister of Munitions should have complete control. I think he had power to pass the property in the plant to third persons, and this is in fact what he has done through the agency of the defendants. The defendants are not in my opinion liable either to pay the proceeds of sale to the plaintiffs, nor to pay damages for their removal or conversion so far as they acted as agents for the Minister of Munitions, as I have found up to the present time they have done.

Lastly, there is a claim for an injunction. The defendants have not confined themselves to justifying their acts as having been done under the instructions of the Minister of Munitions. They have asserted that the plant was theirs, and that they had a right to deal with it. I think, therefore, that the plaintiffs are entitled to a limited injunction in the form in which it appears in the judgment.

Judgment for plaintiffs.

J. F. C.

The defendants appealed.

1917. Feb. 14. *Upjohn, K.C.*, *Hudson, K.C.*, and *Douglas Hogg*, for the appellants. Bray J. has held (1.) that the contract is still subsisting; and (2.) that under the contract the plant upon the site became and still is the limited property of the Water Board. He has accordingly granted an injunction restraining the appellants from removing any further plant or receiving the proceeds of any removed except as agents for the Minister of Munitions. It is submitted that his decision was wrong and that by the action of the Minister of Munitions the whole object of the contract was frustrated and the contract has been determined. It is said that what has happened only amounts to a delay or impediment in the completion of the contract which can be met by an extension of time by the engineer within clause 32. Nothing like this can have been in the contemplation of the parties. An extension of time under that clause was only intended to exempt the contractors from penalty for delay. If the contractors are held liable to complete the contract in the event of the withdrawal of the prohibition by the Minister of Munitions it will be an entirely different contract. The interference of the Minister has rendered it illegal to go on with the work for a period of indefinite duration and the contract must be treated as at an end. If the contract is subsisting, then by the operation of clause 10, so long as the Minister's order is in force, all the plant which the contractors have provided must remain upon the site and cannot be used for any purpose. In the meantime it is deteriorating, and the contractors are losing all benefit from their expenditure. It could never have been intended that the clause

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should produce such a result as that. The declaration that the contract is continuing leads to this result: The contractors have expended about 180,000*l.* They have been paid 40,000*l.* on certificates, and have received 40,000*l.* upon sales of plant under the direction of the Minister. They are therefore out of pocket to the extent of 100,000*l.*, which is tied up indefinitely, while if the Minister cancels his order they will be under the obligation of carrying to completion this huge contract under circumstances which could never have been contemplated at the time it was entered into. The contract is subject to an implied condition avoiding it in case the transaction becomes legally and commercially impossible. The parties contracted on the footing that the plant would, during the contract, remain available for the construction of the works, and, inasmuch as by lawful authority it has been made illegal to use it for the purposes of the contract, the substratum of the contract is gone.

The decision of the learned judge was wrong upon two grounds: (1.) Independent of the intention of the contracting parties, the effect of the order of the Minister of Munitions was to render it illegal to proceed with the works or to prevent the removal of the plant. That attached to every part of the contract on a day when the contractors were required by the terms of the contract to go on with the work. In *Leiston Gas Co.* v. *Leiston Urban Council* (1) one part only of the contract was affected, but here the illegality of proceeding attached to the whole contract, and extends for an indefinite period, the length of which no one can foresee. (2.) There was an implied condition that the contractors should be at liberty to carry out the contract without any interference rendering it illegal to do so. That is a complete answer to an action on the contract.

The following cases afford illustrations of the circumstances under which the Courts have held contracts to be determined:—*Baily* v. *De Crespigny* (2), *Brewster* v. *Kitchell* (3), *Esposito* v. *Bowden* (4), *Distington Hæmatite Iron Co.* v. *Possehl & Co.* (5), *Andrew Millar & Co.* v. *Taylor & Co.* (6), *Geipel* v. *Smith* (7), *Leiston Gas Co.* v.

(1) [1916] 2 K. B. 428.
(2) (1869) L. R. 4 Q. B. 180.
(3) (1698) 1 Salk. 198.
(4) (1857) 7 E. & B. 76.
(5) [1916] 1 K. B. 811.
(6) [1916] 1 K. B. 402.
(7) (1872) L. R. 7 Q. B. 404.

Leiston Urban Council (1), *Scottish Navigation Co.* v. *W. A. Souter & Co.* (2), *Jackson* v. *Union Marine Insurance Co.* (3), *Taylor* v. *Caldwell* (4), *Appleby* v. *Myers* (5), *Howell* v. *Coupland* (6), *Krell* v. *Henry* (7), *Embiricos* v. *Sydney Reid & Co.* (8), *Horlock* v. *Beal* (9), and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (10) [*Quilter* v. *Mapleson* (11), *Dahl* v. *Nelson* (12), and *The Moorcock* (13) were also referred to.]

The appellants in order to succeed must show that the performance of the contract has been substantially affected, and that something has occurred which is more than a mere temporary interruption which might be met by clause 32. The submission is that they have done this by showing that the whole contract has substantially been rendered incapable of being carried out. The condition of things existing at the time of the contract has been altogether altered and the contract is at an end.

Holman Gregory, K.C., and *Joshua Goodland*, for the respondents. What has happened has not rendered the performance of the contract impossible. The supplemental contract was entered into after the commencement of the war. The parties must be taken to have contemplated all the possible consequences and the incidental risk of stress and difficulty. If the prohibition of the Minister of Munitions were withdrawn the appellants would not have to perform a new contract. It is only a question of delay and extra expense, which may be dealt with under clause 32. The contract contemplated that there might be stoppages of work from time to time. There is no evidence that the performance of the contract will be impossible in the future: *Horlock* v. *Beal* (14); *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (10) The contract has not been annulled but only suspended: *Andrew Millar & Co.* v. *Taylor & Co.* (15) It has not been rendered impossible of

(1) [1916] 2 K. B. 428.
(2) [1917] 1 K. B. 222.
(3) (1873) L. R. 8 C. P. 572; (1874) 10 C. P. 125.
(4) (1863) 3 B. & S. 826.
(5) (1867) L. R. 2 C. P. 651.
(6) (1876) 1 Q. B. D. 258.
(7) [1903] 2 K. B. 740.
(8) [1914] 3 K. B. 45.
(9) [1916] 1 A. C. 486.
(10) [1916] 2 A. C. 397.
(11) (1882) 9 Q. B. D. 672.
(12) (1881) 6 App. Cas. 38.
(13) (1889) 14 P. D. 64.
(14) [1916] 1 A. C. 486, 525.
(15) [1916] 1 K. B. 402.

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performance from an engineering point of view, though some of the work may have to be done over again.

[SCRUTTON L.J. referred to *Ropner & Co.* v. *Ronnebeck.* (1)]

The parties must be taken to have contemplated all the risks of war, including the possible temporary interruption of work, and the commandeering of men and materials. The question is one of fact, whether what has happened has swept away the basis of the contract. If the contract is at an end then *Krell* v. *Henry* (2) applies and the loss remains where it is. At any rate, the resulting consequences are not now before the Court.

Where the performance of a contract is rendered impossible by its subsequently becoming illegal, if the impossibility is such as to bring the case within *Taylor* v. *Caldwell* (3) or *Baily* v. *De Crespigny* (4), then it frustrates the contract. Mere temporary illegality, however, does not do so. [In addition to the cases cited by the appellants they referred to *Hadley* v. *Clarke* (5), *Beale* v. *Thompson* (6), *Atkinson* v. *Ritchie* (7), *Barker* v. *Hodgson* (8), and *Spence* v. *Chodwick.* (9)]

Upjohn, K.C., in reply. The supplemental contract had not the effect of post-dating the main contract which was entered into before the war. The contract was brought to an end by the prohibition of the Minister of Munitions, which rendered it illegal to proceed with its performance. The prohibition was a bar of indefinite duration. It is said that the appellants have not proved that the performance of the contract is impossible. That is not the question. It is this : Can the works be executed under the conditions existing at the time when it was entered into ? Bray J. has said that it has not been proved that the contractors will not, after the war is over, be able to carry out the contract at a profit. That again is not the question : *Jackson* v. *Union Marine Insurance Co.* (10) The question whether the contract is commercially possible of performance is not relevant to the position that circumstances have occurred which destroy the basis of the contract.

(1) (1914) 84 L. J. (K.B.) 392; 20 Com. Cas. 95.
(2) [1903] 2 K. B. 740.
(3) 3 B. & S. 826.
(4) L. R. 4 Q. B. 180.
(5) (1799) 8 T. R. 259.
(6) (1804) 4 East, 546.
(7) (1809) 10 East, 530.
(8) (1814) 3 M. & S. 267.
(9) (1847) 10 Q. B. 517.
(10) L. R. 10 C. P. 125.

[SCRUTTON L.J. referred to *Wilson & Co.* v. *Tennants (Lancashire), Ld.* (1)]

The prohibition has effected such an alteration in the circumstances as could not have been contemplated by the parties, who contracted on the basis that there should be liberty and freedom to carry out the contract without interference. It has been illegal for the contractors to proceed for a year past, and that must continue for an indefinite period. Three-fourths of the plant has been removed, and the remainder may also be taken. Notwithstanding that, it is said that the contractors must be prepared to resume the performance of the contract when the prohibition is withdrawn, and that the remedy of the appellants is to claim against the Government for compensation. That cannot be successfully contended : *Baily* v. *De Crespigny*. (2) The appellants are entitled to a declaration that the contract has been determined, and to have the injunction dissolved.

Cur. adv. vult.

March 5. LORD COZENS-HARDY M.R. (after stating the facts and referring to the provisions of the contract). It has not been argued before us that anything done, or any order given, by the munition authorities was illegal or in excess of their powers. This being so, I do not deem it necessary to discuss these powers. Questions soon arose between the Board and the contractors as to their respective rights under the contract, and on May 19, 1916, the writ in this action was issued, seeking a declaration that the contract was still in existence as a binding contract and had not been determined. Bray J. has held that the contract was not abrogated or determined, and granted an injunction to restrain the contractors from removing any of the plant still remaining on the site. The contractors appeal from this judgment. The principles of law which have to be applied to the facts of the present case have, I think, been settled within the last few years. I do not propose to go through the authorities beginning with *Taylor* v. *Caldwell* (3) and ending with *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4) I propose to read a few lines of the speeches of

(1) [1917] 1 K. B. 208.
(2) L. R. 4 Q. B. 180.
(3) 3 B. & S. 826.
(4) [1916] 2 A. C. 397, 403, 406, 407, 422.

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some of the noble Lords who took part in the last case. Those noble Lords all agreed with the general principles, but differed as to their application to the particular facts. Lord Loreburn says: "When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied though it be not expressed in the contract." And: "The condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible." Lord Haldane says: "Where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed but only suspended. The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the Courts cannot take any course which would in reality impose new and different terms on the parties." Lord Atkinson says: "In my view there is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed upon them by the charterparty, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of their contract when they entered into it, that, in the events

which have happened, each of them is now entitled to treat it as at an end." Applying these principles to the facts which I have shortly stated, I find that the contract could not be performed after the receipt of the notice of February 21, 1916, by reason of the lawful act of the Minister of Munitions making it illegal and a criminal offence to continue work under the contract. This was not in form a temporary prohibition. The continuance of a state of war has in many cases been held to be too uncertain to be regarded as temporary. The contractors treated it as of such a nature as to terminate their liabilities under the contract, and the fact that the restraint, which had been in force for six months at the date of the trial, has now been in existence for twelve months is a matter which we are entitled to have regard to: see *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board.* (1) On this ground alone I think the appeal ought to succeed. Even if, which is not proved, the parties may have contemplated the possibility of the outbreak of war, they cannot have contemplated the existence of statutes the like of which have never been known, or the exercise of extraordinary powers justified by those statutes. It might be sufficient to decide the case on the ground of illegality alone, but, out of respect for the arguments addressed to us and for the judgment of the learned judge, I think it right to add a few observations. The contract was one for the execution of very extensive works, the cost of which would not fall short of three-quarters of a million pounds, and involved the employment of several thousand men. It was to be performed within six years, subject, no doubt, to a power in the engineer of the Board to enlarge the time in certain conditions. It gave the Board a limited property in all the plant provided by the contractors for the work. Speaking roughly, 100,000*l.* worth of plant was provided. All this plant has been claimed by the Minister of Munitions, and the greater part of it has been removed and either sold or used elsewhere. There is no provision in the contract enabling the contractors to recover a penny from the Board towards the cost of restoring, or replacing, the necessary plant. It is in my view impossible to consider this otherwise than as an event not in contemplation by either party at the time. It is quite true that there is in clause 32 provision for delays due to certain specified

(1) [1912] A. C. 788.

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causes, such as strikes, which are not to be any excuse for the contractors, but in my opinion those events do not extend to the case of illegality; and, further, I do not think that those events can prevent the Court from considering whether interference due to a subsequent Act of Parliament has been of such a nature as to render the contract substantially a new contract. Lastly, I do not base my judgment on the view that there is no physical possibility of the performance of the contract at the end of the war, and after the removal of the restraint imposed by the Minister of Munitions. Nothing is impossible to an engineer provided sufficient time and money can be secured. Nor do I base my judgment on commercial impossibility or impracticability. The mere circumstance that the contractors might lose money would not suffice to terminate the contract. I base my judgment on the view that it was the manifest intention of the parties that there should be freedom of action on the part of both parties, and that there should be read into the contract an implied term or condition that the liability of performance should cease in the event of the Executive Government, acting lawfully and within their powers, making performance of the contract illegal and impossible. With great respect to Bray J., I think he took a wrong view, and the appeal must be allowed. This will involve the discharge of the injunction as to the plant and the substitution of a new declaration, and the Board must pay the costs of the action here and below. I think it right that we should add a declaration that this judgment is without prejudice to any question as to the rights of either party to the proceeds of sale of plant which has been sold, or as to any retention moneys under the contract. We have not listened to any arguments on these points, which must be dealt with in a separate action.

WARRINGTON L.J. As a result of a tender by the defendants dated June 29, 1914, and the acceptance thereof by the plaintiffs dated July 24, 1914, these two parties entered into a contract whereby the defendants agreed to construct a large reservoir near Staines at the price of upwards of 670,000*l.* to be paid to them by the plaintiffs. The defendants proceeded with the work, and pursuant to a stipulation in the contract, brought upon the site a large quantity of plant the value of which in February, 1916, was

nearly 100,000*l.* On February 21, 1916, the Ministry of Munitions, acting in exercise of powers conferred upon them by the joint operation of the Defence of the Realm Consolidation Act, 1914, the Defence of the Realm Amendment (No. 2) Act, 1915, and the Regulations made thereunder, sent to the defendants a letter requiring them forthwith to cease work on the above-mentioned contract, and further requiring them to comply with such instructions with regard to their plant and the labour at their disposal as might be conveyed to them on the Minister's behalf by Mr. John Hunter, Director of Factory Construction in the Ministry of Munitions. Neither party raises any question as to the validity or legal effect of this order, and for the purposes of this appeal it must be assumed to be justified by the Acts and Regulations above referred to. The result was that the defendants, their officers and servants, became bound to obey the directions given to them by the Ministry both as to the cesser of work and as to the plant and labour and would be guilty of an offence under the Acts should they fail to do so. They did obey. They forthwith ceased work and discharged their men except some few whom they were allowed to keep for the protection of property. A large part of the plant has, under the instructions of the Ministry, been removed and used on munition work, the persons using it paying prices fixed by the defendants with the approval of the Ministry; from this source has been realised upwards of 40,000*l.* A comparatively small and unimportant residue of the plant remains on the site, and this may at any time be removed if the Ministry should so direct. The directions of the Ministry as to cesser of work have never been revoked or modified, and there is no immediate prospect of this being done. So long as the direction remains in force the further prosecution of the work is unlawful and the plant necessary for and appropriated by the defendants to the work is not available. The question to be decided is whether the effect has been to determine the contract and to relieve both parties from their obligations thereunder, or whether, as Bray J. has decided, what has happened is merely a delay in the prosecution of the work capable of being met by a certificate of the engineer extending the time for completion and relieving the defendants from liability to penalties. We have here to deal with an executory contract, the further performance of which becomes

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illegal for an unascertained and indefinite period by virtue of an act of State itself arising out of the state of war existing between this nation and her enemies. The removal of the plant also has produced a material change in the physical conditions under which the work would be continued if and when the illegality is removed.

The legal principles applicable to the case are, I think, well settled. If the further performance of a contract has been rendered unlawful by the law of this country, the contract would be dissolved on both sides: see Lord Ellenborough in *Barker* v. *Hodgson*. (1) A familiar example is that of a contract which involves trading with an alien. On the outbreak of war with the nation to which the alien belongs the performance of the contract becomes illegal as involving trading with the enemy and the contract is dissolved. If the illegality is merely temporary and does not in fact render the lawful performance of the obligations of the contract impossible, then the contract is unaffected and the parties remain bound: *Andrew Millar & Co.* v. *Taylor & Co.* (2) Though the illegality may not be proved to be in fact temporary, the circumstances may be such that the Court may infer that it will last for such a period only and occasion only such a delay as, having regard to the nature of the contract, may be treated as fairly in the contemplation of the parties at the time the contract was entered into. In that case the delay may well be held not to frustrate the objects of the parties and to leave the contract unaffected. The contract may and often does contain provisions in general terms inserted with the object of meeting delays and difficulties in performance and preventing them from having the effect of dissolving the contract. The general terms of such a provision, though wide enough to cover the event which has occurred, will not prevent it from having the effect of dissolving the contract if it is of such a nature as substantially to frustrate the objects of the parties or to render their obligations substantially different to those which they contemplated on entering into the contract: see *Baily* v. *De Crespigny*. (3) The nature of the contract may be such that the existence of a particular thing or person or of a certain state of circumstances constitutes the essential foundation of the contract. In such a case there will be implied a condition that the

(1) 3 M. & S. 267, 270. (2) [1916] 1 K. B. 402.
(3) L. R. 4 Q. B. 180, 185.

thing or person shall continue to exist or the state of circumstances to occur or continue, and in default the contract would be dissolved. Examples of the application of this principle are to be found in *Taylor* v. *Caldwell* (1) and in *Krell* v. *Henry* (2) and the other cases arising out of the postponement of the coronation of King Edward VII. The principle itself will be found concisely and clearly expressed in the judgment of Vaughan Williams L.J. in *Krell* v. *Henry*. (3)

I now come to consider the application of these principles to the particular contract and to the events which have happened, and I will deal first with the direction of the Ministry that the defendants cease work on the contract, rendering the continuance of work illegal so long as that direction continues in force. Can that direction be regarded as merely temporary and to continue in force for so short a time as not substantially to frustrate the objects of the parties to the contract? I cannot take this view. The action of the Ministry is based on the necessity of maintaining or increasing the production of munitions: see Munitions of War Act, 1915, s. 10; this necessity continues, and one may fairly say is likely to continue for the duration of the war, and was likely so to continue at the time it was given. The remarks of Lord Haldane in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4) are appropriate to the present case: "It is impossible for any Court to speculate as to the duration of the war, on which the Admiralty requirements may depend. It is enough that events which are of public notoriety indicate the duration as one about which there is no apparent certainty of which a Court of justice can take cognizance." The interruption then being for a period of uncertain duration, and it being during that period unlawful for the defendants to continue the work, is this an event which destroys the foundation of the contract and in a business sense frustrates the objects of the parties, or is it one of those obstructions or impediments which may be compensated for by a certificate of the engineer under clause 32? Clause 32, after fixing the time for completion, contains the proviso referred to by the Master of the Rolls. I will assume, without deciding it, that the general words "any difficulties impediments

(1) 3 B. & S. 826.
(2) [1903] 2 K. B. 740.
(3) Ibid. 749, 751.
(4) [1916] 2 A. C. 397, 411.

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obstructions oppositions doubts or differences whatsoever and howsoever occasioned" are wide enough to include the event which has happened. It is still necessary to consider whether the event is such as to frustrate the objects of the parties, for if so the contract would be dissolved notwithstanding the general words. I think the parties to such a contract as this must have contemplated that the defendants would be free to perform their obligations without interference by the executive authority of the Government, and to have contracted on the implied condition that the defendants would be so free. The action of the Ministry has deprived them of that freedom and for an indefinite time, and in my opinion therefore, the condition has not been fulfilled and the contract is dissolved. There is a passage in Lord Atkinson's speech in the House of Lords in the *Tamplin Case* (1) which exactly expresses the state of things in the present case; he says: "There is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed upon them by the charterparty, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of their contract when they entered into it, that, in the events which have happened, each of them is now entitled to treat it as at an end." It is true Lord Atkinson was dissenting from the decision of the majority; but there was no difference between them as to the principles to be applied—the difference was only as to their application to the facts of that case. No doubt some interruptions, and interruptions of a serious and possibly prolonged character, such as strikes, were in the contemplation of the parties, but they were such as are incidental to any such contract and of a nature altogether different to that which has occurred. With all respect to the learned judge, I think it is no answer to say that performance is "physically possible" or "commercially practicable." Though the construction of the works may be physically possible and by the expenditure of money commercially practicable, the construction would take place under such altered circumstances that it would not, in my opinion, be the performance of this contract. For these reasons I am of opinion that the direction of the Ministry to cease work would of itself be enough to dissolve the contract by

(1) [1916] 2 A. C. 397, 422.

rendering its further performance illegal. But I think, also, that the compulsory removal of the plant has had the same effect. Under the contract the defendants were bound to provide all plant necessary for the due and proper completion of the works (clause 7), and it was provided by clause 10 as follows. [The Lord Justice read the clause and continued :] By this I understand that as long as the defendants required the plant for construction they were to be at liberty to keep it on the works. They were bound to execute and carry on the works with due diligence (clause 21), and in my opinion the performance of their obligations depended essentially on their continued power to use the plant. It seems to me that there was an implied condition that they should have such power. In fact they have been deprived of it, and a large and essential portion of the plant has been removed and is no longer available. I think the case falls within the principle of *Taylor* v. *Caldwell* (1) and *Krell* v. *Henry*. (2) On this ground also I think the contract was dissolved. After the commencement of the works considerable alterations were made, and some consequent modifications of the original contract were expressed in a supplemental contract dated May 10, 1915, after the outbreak of war. It is contended that this fact must be taken to show that as from that date, at all events, the parties must have had in contemplation such events as have happened, and as they have not provided against them such conditions as are referred to above cannot be implied. I cannot accept this argument. In May, 1915, they of course knew of the war, but neither they nor any one else could prophesy as to the powers which would be conferred on the Ministry of Munitions, which did not then exist. Moreover, the agreement of May 15, 1915, cannot be treated as if it were a fresh contract. It merely settled certain terms rendered necessary by the alterations, and was entered into in compliance with an obligation imposed by the original contract. In my opinion the judgment of Bray J. must be discharged, and an order made to the effect that the Court being of opinion that the contract is dissolved it does not think fit to make any of the declarations or give any of the directions claimed by the plaintiffs. Our order will be without prejudice to other questions between the parties not involved in the present action.

(1) 3 B. & S. 826. (2) [1903] 2 K. B. 740.

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SCRUTTON L.J. (after stating the facts). From the date of the letter of the Minister of Munitions to the present time, over a year now, all work on the contract site, including all pumping, has been illegal and has been stopped. All the men, some six hundred, have been drafted off to munition factories. There was at the date of the letter 90,000*l.* worth of contractors' plant on the ground. A very large portion of this has been taken away and employed under the direction of the Minister of Munitions in munition work. We were told that one at least of the engines was in Mesopotamia. The Minister of Munitions controls the rest of the plant. There is no reason to believe that the restriction on work will be removed before the end of the war, and no one knows when that end will come. The soil has filled up again with water that had been pumped out; the excavations and trenches are full of water. One deep trench in which there were difficulties of construction, with which the contractors had anyhow to deal, has now been filled with water for a year, and its present condition is unknown. What is the legal effect of this? Is the contract merely suspended; and when the war ends and the restriction is removed, must the contractors again bring back plant and men and start again to make good and finish the work, relying on such extra time as the engineer may allow them, but with no increase of price? Or is the contract, by the illegality and impossibility of performance, now for a year certain, with a prospect of indefinite continuance, abrogated, and the parties released from future performance?

Where parties have entered into a contract the performance of which is afterwards interrupted or prevented by circumstances not imposing legal liability for breach of contract on either party, the question, in the absence of any express provision in the contract, whether further performance is completely excused, the contract being at an end, or is suspended till the removal of the cause of interruption, or whether the interruption furnishes no excuse to the party prevented from performance, depends on the exact nature of the implied term, if any, in that particular contract, and whether, when the terms of that implication are settled, what has happened falls within those terms. This view is explained by Lord Parker and Lord Loreburn in *Tamplin's Case* (1),

(1) [1916] 2 A. C. 397.

in which case there was no difference as to principles amongst the members of the Court, but great variance in the application of them. The cardinal rule as to the circumstances under which a term may be implied in a contract is stated by Bowen L.J. in the well-known case of *The Moorcock* (1): "The law raises an implication from the presumed intentions of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." One well-known application of this principle is that where the performance of the contract depends upon the existence of a thing, or the good health of a person, the destruction of that thing, or the ill-health of the person at the material date, puts an end to the contract. Thus in *Taylor* v. *Caldwell* (2) the burning of the theatre put an end to the contract to pay rent for it; the death or serious illness of an artiste engaged to perform on a particular day puts an end to the contract on both sides: see Bramwell B. in *Jackson's Case.* (3) A recent application of the principle in this class of case will be found in *Shipton, Anderson & Co.* v. *Harrison Brothers & Co.* (4), where sellers who had contracted to deliver wheat ex a named steamer within a limited time were held excused by Government requisitioning of that wheat for the war. In *Nickoll* v. *Ashton, Edridge & Co.* (5), where cotton was sold to be shipped per steamship *Orlando* in January, 1900, and the steamer was so damaged by perils of the sea that she could not load in January, the seller was held excused and the contract at an end. In all these cases a term was implied that if some subject-matter essential to the performance of the contract was at the material date of performance, and without default of either party, not available for performance the contract should be at an end. The implication is made because the parties must be taken to have contemplated the availability of that subject-matter, and not to have contracted in respect of a case when it was not available. The incapacity of the person or injury to the subject-matter may be temporary. The question then is whether the temporary interruption or impossibility to perform the contract is such as was within the contemplation of the parties, or whether

(1) 14 P. D. 68.
(2) 3 B. & S. 826.
(3) L. R. 10 C. P. 145.
(4) [1915] 3 K. B. 676; 21 Com. Cas. 138.
(5) [1901] 2 K. B. 126.

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its extent is such, "so great and so long as to make it unreasonable to require the parties to go on with the adventure": per Lord Blackburn in *Dahl* v. *Nelson*. (1) Thus in *Jackson* v. *Union Marine Insurance Co.* (2) damage to a ship which would take a long time to repair was held to frustrate the commercial adventure of carrying a cargo to a named port and to put an end to the contract. Another way of expressing it is to use the language of Parke B. in *Graves* v. *Legg* (3) and Blackburn J. in *Bettini* v. *Gye* (4) and *Poussard* v. *Spiers* (5) and inquire whether the interruption to performance goes to the root of the matter or the consideration so that it would render the carrying out of the rest of the contract a thing different in substance from what the parties have stipulated for. An extension was, I think, made in the English application of the principle when in the Coronation cases, of which *Krell* v. *Henry* (6) is an example, the continued existence of a state of things which was not the subject-matter of the contract or essential for its performance, but was the reason for the contract, was treated as an implied condition of the continuance of the contract. A contract to let rooms on a particular day was abrogated when the coronation procession which was to pass the windows of the room was abandoned. The difficulties of applying the principle may be seen by comparing the decision in *Krell* v. *Henry* (6) with that in *Herne Bay Steam Boat Co.* v. *Hutton* (7), but the principle is the same. Did the parties contemplate, in the events that happened, that the contract would remain good, or do those events make such a different set of circumstances that the parties did not contract with regard to it? The question seems to me to become less difficult when the impossibility of performance is due to subsequent illegality, especially when that illegality is a consequence of war. It is much easier to imply a term that the contract shall cease to be binding if its performance becomes illegal, especially when the duration of the illegality depends on a state of war, which the Courts take to be of lengthy though uncertain duration. "If H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from

(1) 6 App. Cas. 53.
(2) L. R. 10 C. P. 125.
(3) (1854) 9 Ex. 709, 716.
(4) (1876) 1 Q. B. D. 183, 188.
(5) (1876) 1 Q. B. D. 410, 414.
(6) [1903] 2 K. B. 740.
(7) [1903] 2 K. B. 683.

doing it, the covenant is repealed": *Brewster* v. *Kitchell.* (1) In *Baily* v. *De Crespigny* (2) a landlord covenanted that neither he nor his assigns would permit a messuage to be built on certain land. An Act of Parliament then gave a company a compulsory power to take the land and build on it. The Court held the landlord was relieved from his covenant, and Hannen J., in delivering the judgment of the Court, said: "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." The parties cannot be taken to contract to do what is illegal, and are relieved when the performance becomes illegal, unless it is clear that the illegality is so temporary as not substantially to interfere with the performance of the contract, such for instance as an Early Closing Act or an Eight Hours Day Act, or the case of a short illegality before the date of performance, which arose in *Andrew Millar & Co.* v. *Taylor & Co.* (3) The question of the probable duration of the illegality has been frequently considered by the Courts where the illegality arises from war. Strictly, in my opinion a party to a contract who claims that on a particular day the contract is abrogated takes the burden of proving that on that day the interruption is so serious as to avoid the contract. To use the words of Lord Halsbury in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (4), "It would be only a question of evidence which one might ascertain at that time, or wait until the facts had proved it by the occurrence of those facts subsequently." In the case before us the plaintiffs ask for a declaration that at the date of the writ, May 19, 1916, the contract was subsisting. But the trial judge or the Court of Appeal is entitled to take into account the real duration of the interruption as proved by the facts that have happened since the writ. "The Court of Appeal was entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard": per Lord Gorell in *Attorney-General* v. *Birmingham, Tame and Rea District Drainage*

(1) 1 Salk. 198.
(2) L. R. 4 Q. B. 180, 185.
(3) [1916] 1 K. B. 402.
(4) [1897] A. C. 609, 611.

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Board. (1) In *Geipel* v. *Smith* (2), under a charter to load coals in England and proceed to Hamburg, restraint of princes excepted, Hamburg was blockaded by the French fleet, and the charterer was held excused from loading a cargo and not further bound by the charter. This was not because blockade running was illegal by English law, but because the performance was excused for a time for which it would be unreasonable to wait; "there was an insuperable obstacle to the performance of it in toto." As Lush J. said (3), "If the impediment had been in its nature temporary, I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this." This follows the judgment of the Court of Exchequer Chamber in *Esposito* v. *Bowden* (4), where a charterparty from Odessa was avoided by the Crimean war. The Court said "the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising." This passage was applied by Phillimore L.J. in the Court of Appeal in the recent case of *Zinc Corporation* v. *Hirsch* (5): "This agreement being incapable of continued performance during the war, 'the end of which cannot be foreseen' (*Esposito* v. *Bowden* (4)), is prima facie dissolved, abrogated, or avoided by the war." Two at least of the members of the House of Lords in *Horlock* v. *Beal* (6) use the same language. Lord Atkinson says: "It is not necessary to wait till the delay has occurred. It is legitimate to come to the conclusion that the delay caused by war will be so long and so disturbing to commerce as to defeat the adventure and to act accordingly at once." Lord Shaw says: "The stoppage and loss having arisen from a declaration of war must be considered to have been

(1) [1912] A. C. 802.
(2) L. R. 7 Q. B. 404.
(3) Ibid. 414.
(4) 7 E. & B. 763, 792.
(5) [1916] 1 K. B. 541, 560.
(6) [1916] 1 A. C. 502, 507.

caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure." The decision of the Court of Appeal in *Leiston Gas Co.* v. *Leiston Urban Council* (1), where the urban council were held not relieved from a quarterly payment for the supply of gas plant and gas by a Government order prohibiting the lighting of lamps, turns on the fact (1.) that the payment was partly for an installation of gas plant of which the council had had the benefit, and which continued available, and only partly for supply of gas, while the payment did not depend upon the quantity of gas supplied, and the two parts were not severable, and (2.) partly, in the view of one member of the Court, on the fact that the length of prohibition was not sufficient in relation to the rest of the contract to frustrate the adventure of the parties. As an application of principle the decision falls in line with the decision of the majority of the House of Lords in *Tamplin's Case* (2); but it is to be noticed that the attention of the Court of Appeal was not called to the view taken by various judges of the probable duration of an impediment depending on war. Applying the principles stated to the facts of this case, I am impressed by a passage in the judgment of Lord Atkinson in *Tamplin's Case* (3), which is as follows: "There is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed upon them by the charterparty, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of their contract when they entered into it, that, in the events which have happened, each of them is now entitled to treat it as at an end." It seems to me that the parties must have contemplated in this case that it should be legally possible or lawful for them to work on the site continuously, subject to such minor interruptions as are spoken of by Lord Loreburn in *Horlock* v. *Beal.* (4) The availability of the site and the legal possibility of work on it seem to me to be conditions on which the existence of the contract must have depended in the contemplation of the parties. Here it is illegal to work on the site, not directly because of the outbreak of war, but by a Government

(1) [1916] 2 K. B. 428.
(2) [1916] 2 A. C. 397.
(3) [1916] 2 A. C. 422.
(4) [1916] 1 A. C. 494.

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order made in consequence of the existence of war, and obviously becoming more justified and likely to remain in force the longer the war continues and the more demand is made for men and material for the prosecution of the war. To such a situation the opinions of the Courts which I have cited apply with special force, and the obstacle to performance must be taken to be one the end of which cannot be foreseen. The illegality has already lasted a year, and he would be a daring man who would foretell the end of the war. It is not merely that it is illegal to work on the site. Certain work already done must be done all over again. Plant to the value of 90,000*l.* was brought on the site. This has all been requisitioned by the Ministry of Munitions, and the greater part of it has been disposed of. The continued validity of the contract means that the contractors must at some uncertain time in the future get together a second set of plant, to which the Water Board contends that none of the provisions of the contract about advances in value will apply. The engineer to the Water Board writes on March 22, 1916: "On the recommencement of the contract items of plant similar to those included in this list must be placed on the works, and no credit, such as is provided for under clause 42 of the conditions of contract, will be allowed on such items of plant." Clause 28 clearly contemplated that the contractors must make good accidents or injury to works or plant, rain, flood, and frost being specially mentioned. But I can see nothing in clauses 6 or 28 to show that the parties contemplated the commandeering of 90,000*l.* worth of plant by the Government, or expected the contractors to replace such an extensive requisitioning. Further, some of the work will have to be done over again, all the pumping out must be repeated, and some of the trenching may need renewal. Counsel was asked what would happen if when the work was three-quarters done the Government had levelled all the embankments as dangerous to the defence of London and prohibited their erection during the war. He hesitated to answer. I cannot believe the contractors could be required to do the work all over again for no extra payment. The strength of the Water Board's argument lay in clause 32, and it was said that the parties contemplated that an extension of the time for the performance of the contract, to be judicially determined by the engineer, would be enough to compensate for any interruption in performance

by any impediment. But it has been decided that these clauses excusing performance temporarily must always be read as subject to any overriding condition as to the continued validity of the contract which can be judicially implied. Lord Haldane expresses this in *Tamplin's Case* (1) thus: "There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charter-party under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." I cannot find in this clause (clause 32) that the parties were contemplating illegality of performance of substantial and uncertain duration. They contemplate strikes, but strikes have always been treated by the Courts as subject to such unexpected termination that they cannot without more be treated as abrogating contracts: see per Bailhache J. in *Ropner & Co.* v. *Ronnebeck* (2), where the operation of strikes is distinguished from that of war. Counsel for the Water Board were asked whether any length of illegality due to the war would in their view terminate the contract. They hesitated to answer, but at length admitted that it would not. I think their argument compelled them to make the admission, but I cannot believe that a twenty years' war (absit omen) and twenty years' illegality would find the parties bound at the end of the war to resume the long interrupted adventure. In my view it was a condition of the validity of this contract that it should be legal and therefore possible to work on the site continuously subject to minor interruptions, and therefore an illegality of performance in consequence of

(1) [1916] 2 A. C. 397, 406. (2) 20 Com. Cas. 99.

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war, which must be treated as more than temporary and of uncertain duration, would abrogate the contract and release the parties. Bray J.'s judgment does not appear to me to deal with the effect of illegality at all. He reads clause 32 as applying to every event other than default of the contractors which delayed Dick, Kerr & Co. Apparently this would include an Act of Parliament prohibiting the work, which I cannot believe the learned judge really meant to include. He next considers whether the order renders the contract physically impossible. Of course it does not render it physically impossible at the end of the war; nor was the voyage in *Jackson* v. *Union Marine Insurance Co.* (1) physically impossible after repairs, or the letting of the room in *Krell* v. *Henry* (2) physically impossible on the day named. Physical impossibility appears to me only to apply to cases requiring a definite subject-matter existing on a day fixed for performance, such as *Taylor* v. *Caldwell.* (3) In this case performance was illegal and therefore impossible for at least a year, with an indefinite prospect of further impossibility. The learned judge next considers whether the object of the contract has been frustrated or completion rendered commercially impracticable; he treats this as a question of fact, and finds as a fact that a delay of two years will not frustrate the object of the contract, that it is not commercially impracticable, and does not impose a different contract on the parties. It seems to me quite true that the Water Board will want a reservoir at the end of the war, and that the difficulties caused to the contractors by the delay through the war would not distress the Board very much if the Board had not to pay for them; but it also seems to me clear that a period of construction, with a long and indefinite delay in the middle of it, followed by the necessity of fresh provision of plant and reconstruction of work, is not the adventure the parties contemplated. The recent cases on the subject show what different views may be taken of the effect of war on these contracts, and certainly in this case I have, after careful consideration, come to a different result from that reached by Bray J. I am therefore of opinion that his judgment, with its declaration and injunction, should be set aside, and that judgment should be entered for the defendants in the action, with a declaration

(1) L. R. 10 C. P. 125. (2) [1903] 2 K. B. 740.
(3) 3 B. & S. 826.

in the form proposed by Warrington L.J. The result may raise numerous other questions as to the rights of the parties in respect of work already done and advances made. We have not the materials to deal with these in this action.

The appeal must be allowed with costs here and below.

WARRINGTON L.J. I think this will be the right order: "Discharge the order of the King's Bench Division dated July 31, 1916; and, this Court being of opinion that the contract is not in existence as a binding contract, but has been determined, doth not think fit to make the declarations, or give any of the relief claimed by the plaintiffs in this action; but this order is without prejudice to any questions between the parties not raised by the pleadings in this action. The plaintiffs to pay the costs here and below."

Appeal allowed.

Solicitor for appellants: *Walter Moon.*

Solicitors for respondents: *Linklater, Addison & Brown.*

G. A. S.

C. A. [IN THE COURT OF APPEAL.]

1917 HOOD *v.* WEST END MOTOR CAR PACKING COMPANY.

Jan. 19, 22, 23. [1915 H. 1909.]

Insurance (Marine)—"Held covered" Clause—Motor Car carried on Deck—Error in Description of Interest—Notice to Underwriters within reasonable Time—Institute Cargo Clauses, No. 4.

By a policy of marine insurance, dated November 13, 1914, in the ordinary Lloyd's form, a motor car was insured against the usual perils on a voyage from London to Messina, the insurance being described as "500*l.* on motor car and accessories (in case) so valued." The Institute Cargo Clauses were attached, clause 4 of which was as follows: "Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel, or voyage." By the terms of the bill of lading, dated December 8, under which the car was shipped, the shipowners were authorized to carry it on deck at shipper's risk, and it was carried on deck accordingly. There was no evidence of any usage authorizing the car to be carried on deck within r. 17 of the Rules for Construction of Policy in Sched. I. to the Marine Insurance Act, 1906. The ship sailed on January 8, 1915, and on arrival at Messina the car was found to be so damaged by the sea as to be valueless. No notice that the car was shipped on deck was given to the underwriters until after the loss. There was evidence that many underwriters would refuse to insure at any premium a car carried on deck against all risks, and that those who would be willing to insure it would require an unusually high premium:—

Held, upon the authority of *Thames and Mersey Marine Insurance Co.* v. *Van Laun* (1), that clause 4 of the Institute Cargo Clauses did not protect the assured, as it was an implied term that notice should be given to the underwriters within a reasonable time after the assured knew that the car was being carried on deck; that such notice was not given; and that therefore the risk was not covered by the policy.

Judgment of Rowlatt J. [1916] 2 K. B. 395 affirmed on different grounds.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury; reported [1916] 2 K. B. 395.

The plaintiff at the end of October, 1914, being desirous of sending a motor car from London to Messina, applied to the defendants to

(1) See note at end of this report, post, p. 48.

give him an estimate for packing, shipping, and insuring the car, and the defendants in reply quoted as follows: "To packing and freighting same to Messina 31*l.* 10*s.* Insurance extra. All risks and breakage 12*s.* 6*d.* per cent. War risk 20*s.* per cent." The plaintiff accepted the estimate, but shortly afterwards by consent war risk was excepted, the plaintiff being content to take the chance of war risk himself; and he accordingly instructed the defendants to pack and ship the car and insure it against marine risks on the terms quoted. The defendants, being only packers, employed G. W. Sheldon & Co., a firm of shipping agents, to arrange for the shipping and insurance. They arranged with the General Steam Navigation Company to carry the car to Messina on the terms of a note stating the conditions of carriage which included "Liberty to carry on deck at shipper's risk." They then instructed Mr. E. J. Murray, an outside broker, to effect the policy of insurance. The defendants had suggested to Messrs. Sheldon the employment of Murray as the insurance broker, believing him to be a member of Lloyd's in consequence of a letter written by him in which he said that "our syndicate is a first-class one at Lloyd's." He, not being a member of Lloyd's, employed Messrs. Byas, Moseley & Co., a firm of regular brokers at Lloyd's, who procured subscriptions to a policy, dated November 13, 1914, for "500*l.* on motor car and accessories (in case) so valued," on board the steamship *Hero* from London to Messina. The policy was in the ordinary Lloyd's form, with the Institute Cargo Clauses attached, clause 4 of which was as follows: "'Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel, or voyage." The bill of lading, dated December 8, 1914, under which the car was shipped described the goods as "one case motor car on deck at shipper's risk," and it contained a clause in print, "Goods shipped as one parcel to be delivered in same way, and if shipped on deck (as the shipowners and/or charterers are hereby authorised to do) they are so shipped at merchants' risk." On January 5, 1915, Messrs. Sheldon wrote to Murray to inform him that the car was being shipped on deck and to ask whether that would make any difference to the premium. On receipt of that letter Murray, according to his statement, telephoned to Messrs. Byas, Moseley & Co. to inquire whether the

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fact of carriage on deck would affect the premium, and was informed over the telephone that it would not, but no letter confirming the alleged telephonic message was produced. Messrs. Byas, Moseley & Co. denied that they received any such message or gave any such answer. Murray then informed Messrs. Sheldon that the underwriters would not require any increase of premium in consequence of the car being shipped on deck, with the result that the steamer sailed on January 8 without any alteration having been made in the policy. The steamer met with rough weather on the voyage, and in consequence the car was so damaged by the action of the waves that on arrival at Messina it was found to be beyond repair and valueless.

The underwriters repudiated their liability to pay the loss on the ground of the non-disclosure to them of the fact of the car being carried on deck; and the plaintiff, being advised that he could not recover from them, brought this action against the defendants for having negligently and in breach of their contract allowed the car to be shipped on deck instead of under deck, and for having negligently and in breach of their contract failed to cause it to be insured against "on deck" risks. It was admitted that there was no usage that a motor car carried on deck is covered, though not insured specifically, within the meaning of r. 17 of the Rules for Construction of Policy in Sched. I. to the Marine Insurance Act, 1906. The defendants, in the event of their being held liable to the plaintiff, claimed to be indemnified by Murray upon the ground that the negligence, if any, in failing to insure the car on deck was his and not theirs. There was evidence that the risk was very considerably increased by the car being carried on deck. One witness said that "a great many underwriters would not touch it on deck; it is a matter of special bargain; it is necessary to tell the underwriters, otherwise it is not covered"; while other evidence showed that there would be great difficulty in getting a car insured on deck during a winter voyage across the Bay of Biscay, and that those underwriters who would be willing to insure on deck against "all risks" would require a considerable increase of premium.

Rowlatt J. held that the risk was not covered by the policy, and he gave judgment for the plaintiff for 500*l*., and he also held that Murray was liable to indemnify the defendants as stated in the

report of the case in the Court below. (1) The defendants appealed.

Newbolt, K.C., and *Graham Mould* (for *Arthur Lawton*, serving with His Majesty's Forces), for the defendants. The defendants did not absolutely agree to procure an effective insurance against all risks except war risk, but only to use reasonable care and skill to procure such an insurance: *Moore* v. *Mourgue* (2); *Comber* v. *Anderson*. (3) They were not negligent in procuring the insurance. They were only packers, and had to employ a broker to effect the insurance, and in the circumstances they used due care and skill in procuring the insurance. [*Commonwealth Portland Cement Co.* v. *Weber, Lohmann & Co.* (4) was also referred to.]

Next, the risk was covered by the policy. By clause 4 of the Institute Cargo Clauses the assured is held covered at a premium to be arranged in case of any error in the description of the interest. "Interest" means subject-matter: *Hewitt Brothers* v. *Wilson*. (5) The subject-matter intended to be insured was a motor car carried on deck, and there was an error in not so describing it. By r. 17 of the Rules for Construction of Policy in Sched. I. to the Marine Insurance Act, 1906, inasmuch as the car was not specifically insured as being carried on deck the policy only applied if the car was carried under deck. There was therefore an error in the description of the subject-matter of the insurance. In *Greenock Steamship Co.* v. *Maritime Insurance Co.* (6) Bigham J. held that a clause—"Held covered in case of any breach of warranty . . . . at a premium to be hereafter arranged"—applied to a warranty of seaworthiness, and that it entitled the shipowner, as soon as he discovered that the warranty had been broken, to require the underwriter to hold him covered, even though the breach of warranty was not discovered until a loss had occurred. The judgment is therefore wrong. [*Maritime Insurance Co.* v. *Stearns* (7) and *Mentz, Decker & Co.* v. *Maritime Insurance Co.* (8) were also referred to.]

(1) [1916] 2 K. B. 402.
(2) (1776) 2 Cowp. 479.
(3) (1808) 1 Camp. 523.
(4) [1905] A. C. 66.
(5) [1915] 2 K. B. 739.
(6) [1903] 1 K. B. 367, 374; affirmed on another ground [1903] 2 K. B. 657.
(7) [1901] 2 K. B. 912.
(8) [1910] 1 K. B. 132.

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MacKinnon, K.C., and *E. F. Spence*, for the plaintiff, were only required to argue whether the policy covered the risk. Prima facie the policy is not such as the defendants undertook to procure. They undertook to procure a policy against all risks, except war risk, at 12*s.* 6*d.* per cent. They did not do so, as they shipped the car on deck, and the policy only covered the car if carried under deck: Rules for Construction of Policy, r. 17, in Sched. I. to the Marine Insurance Act, 1906. Clause 4 of the Institute Cargo Clauses does not assist the defendants. The omission to describe the car as shipped on deck is not an "omission or error in the description of the interest." The omission or error must be in the subject-matter insured, that is, the goods themselves. The clause does not include a misdescription of the part of the vessel in which the goods are to be carried. The clause, no doubt, is obscure, but it cannot apply to a totally different subject-matter which the parties never intended to insure. There must be a common error. There must be a consensus to insure the particular thing, though it may be wrongly described; as, for instance, a particular ship wrongly named or a motor car wrongly described. Thus in *Hewitt Brothers* v. *Wilson* (1) the clause was held to apply where printing machinery was insured, whereas the machinery was second-hand machinery. Unless the clause is limited in some such way, a totally different thing can be substituted for the thing insured. As Kennedy L.J. said in *Reliance Marine Insurance Co.* v. *Duder* (2), it is not permissible to alter the effect of a contract according to the intention of one of the two contracting parties. Moreover, the omission or error, even assuming that there was one, must exist at the time when the policy is effected, which was clearly not the case here. Clause 4 therefore does not apply to the present case. Even if it does apply, notice of the omission or error must be given to the underwriters within a reasonable time after the facts have come to the knowledge of the assured: *Thames and Mersey Marine Insurance Co.* v. *Van Laun.* (3) No such notice was given here. Another objection to the application of clause 4 is that the defendants have not proved that any responsible underwriter would have undertaken the risk at any premium which

(1) [1915] 2 K. B. 739.
(2) [1913] 1 K. B. 265, 273.
(3) See note at end of this report, post, p. 48. The case is referred to in Arnould on Marine Insurance, 9th ed., p. 514.

a reasonable person would have paid ; and further, even if they had proved that on payment of an extra premium the risk could have been covered, that would only go in mitigation of damages, and would not be any answer to the claim for breach of contract to procure an insurance at a certain premium.

Newbolt, K.C., in reply. The extra premium payable under clause 4 of the Institute Cargo Clauses cannot be considered as being merely in mitigation of damages. The policy is an effective policy on payment of the extra premium.

SWINFEN EADY L.J. This is an appeal by the defendants against a judgment of Rowlatt J. in favour of the plaintiff for 500*l.* The plaintiff was the owner of a motor car, and he applied to the defendants for an estimate of the cost of packing the car, despatching it to Messina, and insuring it against all risks and breakage, including war risks. On October 29, 1914, the defendants gave an estimate for " packing and freighting same to Messina, 31*l.* 10*s.* Insurance extra. All risks and breakage 12*s.* 6*d.* per cent. War risk 20*s.* per cent." On November 2 the estimate was accepted by the plaintiff, and the defendants were requested to collect the car and pack and freight it to Messina and insure it against all risks and breakage, including war risk. There was thus a contract by the defendants to do the work for a fixed sum. Shortly afterwards by consent the contract was varied by the omission of the insurance against war risk, the plaintiff taking that risk upon himself, otherwise the contract remained unaltered. The defendants were not desirous of carrying out the whole contract themselves. They only packed the car in a case, and employed Messrs. G. W. Sheldon & Co., shipping agents, to effect the shipping and insurance. On November 30 the General Steam Navigation Company gave a quotation in writing for carrying the car from London to Messina, " with liberty to carry on deck at shipper's risk." Messrs. Sheldon instructed Mr. Murray, who was an outside broker, to effect the insurance. That was unfortunate, because in his evidence Murray said that he had no knowledge of such business. Not being a member of Lloyd's, he could not effect an insurance there, and accordingly he employed Messrs. Byas, Moseley & Co., a firm of brokers at Lloyd's, who procured the insurance. That was the

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chain of persons through whose hands the matter passed. On December 8 Messrs. Sheldon prepared a bill of lading, in which the goods were described as "one case motor car on deck at shipper's risk." We are told that the words "on deck at shipper's risk" were not there when the bill of lading was prepared, but were stamped in afterwards before the bill of lading was signed. The bill of lading contained a clause in print: "Goods shipped as one parcel to be delivered in same way, and if shipped on deck (as the shipowners and/or charterers are hereby authorised to do) they are so shipped at merchants' risk." Messrs. Sheldon were therefore aware that the car was being shipped on deck. Upon January 5 they wrote to Murray informing him that the car was being shipped on deck and asked him if it would make any difference in the premium, and Murray said it would not. Before giving that answer Murray said that he communicated by telephone with Messrs. Byas, Moseley & Co., and that they replied that it would not. Messrs. Byas, Moseley & Co. denied having given that answer. On arrival at Messina the car was found to be practically destroyed. The policy did not specifically insure the car as carried on deck, and it is conceded that there is no "usage to the contrary" within the meaning of r. 17 of the Rules for Construction of Policy in Sched. I. to the Marine Insurance Act, 1906. It is clear that the policy as effected did not cover the car on deck.

The first question is, What was the contract between the plaintiff and the defendants? Was it a contract by which the defendants only agreed to take all reasonable steps to procure an effective insurance on the car, or was it a contract by which they undertook to procure an effective insurance on the car? In my opinion the defendants in consideration of certain payments entered into a definite contract to pack the car, ship it, and pay freight to Messina, and to procure an effective insurance against all risks and breakage except war risk. That was the contract. The next question is, Have they performed it? It is conceded that the policy does not cover the car so far as the body of the policy is concerned. The underwriters were not informed that the car was to be carried on deck. It is not disputed that after it was known that the car was being shipped on deck no notice was given to the underwriters that the car was to be carried in that way. The defendants rely upon

clause 4 of the Institute Cargo Clauses to establish that the policy covered the risk. In the Court below clause 7 was also relied upon, but in this Court no question was raised upon that clause. Clause 4 provides as follows: "Held covered at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage." With regard to a similar clause the House of Lords have held in *Thames and Mersey Marine Insurance Co.* v. *Van Laun* (1) that it is an implied term of the contract, in the absence of any express term as to notice, that notice must be given to the underwriters within a reasonable time after the facts have come to the knowledge of the assured, if he wishes to rely upon the clause. In the present case no such notice was given to the underwriters, and the defendants therefore cannot rely upon the clause. There is this further point: According to the terms of the contract the insurance was to be effected for the plaintiff upon his making certain payments, and upon those payments being made he was to have an insurance against all risks and breakage except war risk. The defendants allege that on payment of an extra premium such risks would be covered by the policy. In the first place, they failed to prove it. Upon the evidence I am not satisfied that any such insurance could have been obtained at all, that is to say, an insurance covering the motor car on deck. [The Lord Justice referred to the evidence.] The defendants failed to prove that the policy effected was one which by payment of an extra premium would cover the risks agreed to be insured against. But, even if they had proved it, it would not help them, because they had agreed for a fixed premium to procure a policy against all risks except war risk. They failed to do so. The appeal must be dismissed.

BANKES L.J. I agree. The case seems to me to have been fought in the Court below upon a false issue. The plaintiff was partly in fault, because in the statement of claim he alleged that the defendants "negligently and in breach of the contract" failed to require the car to be carried under deck and permitted it to be carried on deck, and "negligently and in breach as aforesaid" failed to cause it to be insured against on-deck risks; and at the

(1) See note at end of this report, post, p. 48.

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beginning of the argument for the plaintiff as reported in the Court below (1) the contention is stated to be that " the defendants having undertaken to ship and insure the car were bound to take all reasonable precautions to provide that it should not be injured on the voyage and to cause it to be insured against all risks other than war risks." Upon the true construction of the contract that question does not arise. The contract was that on payment of 31*l.* 10*s.* the defendants undertook to pack and freight the car to Messina and to procure an insurance on it against all risks, except war risks, at a premium of 12*s.* 6*d.* per cent. If that is the true construction of the contract, the question of negligence raised in the Court below does not arise. It is admitted that the policy in the form in which it was taken out did not cover the risk agreed to be covered at the stated premium of 12*s.* 6*d.* per cent. The action is really an undefended one. The defendants did not do what they contracted to do, namely, take out a policy covering all risks except war risk at the stated premium. In order to escape from that difficulty the defendants say that upon payment of an increased premium the policy is in such a form that the plaintiff can recover on it. In my opinion, the contract being as I have stated it, the defendants can only introduce that matter on the question of the damages which they have to pay for the breach, upon the principle that the plaintiff must do what he reasonably can to mitigate the damages. If the defendants could have proved that on payment of an increased premium the risk could have been insured, that would go in mitigation of damages. Upon the evidence the defendants have failed to show that an insurance could have been effected against the risk of carrying the car on deck by payment of any premium. Moreover, even if they had proved that they could have insured against that extra risk, upon the authority of *Thames and Mersey Marine Insurance Co.* v. *Van Laun* (2) they failed to take such steps as would give them the advantage of clause 4 of the Institute Cargo Clauses. As that case shows, upon the facts coming to the knowledge of the assured he must give notice to the underwriters within a reasonable time. For these reasons the appeal fails, though I think that at the trial in the Court below the

(1) [1916] 2 K. B. 397.

(2) See note at end of this report, post, p. 48.

decision upon the question of negligence was a decision upon an immaterial point.

SCRUTTON L.J. I am of the same opinion. The first question is, What is the liability of the defendants under their contract with the plaintiff? When a person is instructed to procure an insurance he is bound to use reasonable care and skill to effect the policy. If he is unable to procure the policy, he must at once inform his principal of his inability to do so. There is a very large class of business where a person does more than merely undertake to effect a policy. He sells a policy and incurs all the liability of a vendor, as for instance in the case of a c.i.f. contract. The first question, therefore, is whether this is a case where the defendants contracted to use care and skill to procure a policy against all marine risks at the named figure or contracted to procure an effective policy against those risks at that figure. Upon the true construction of the documents I think that the defendants undertook the latter obligation, namely, to procure a policy against all risks except war risks. The next question is, Have they performed that obligation? They shipped the car on deck. In the body of the policy it is stated that the insurance was "on motor car," not stating that the car was to be carried on deck. By the old law before the Marine Insurance Act, 1906, and now by r. 17 of the Rules for Construction of Policy in Sched. I. to the Act, in the absence of any usage to the contrary cargo carried on deck must be insured specifically. The defendants therefore have not procured a policy in terms covering a motor car carried on deck against all marine risks. It is said, however, that the policy gives the plaintiff the right to get such an insurance because of clause 4 of the Institute Cargo Clauses. It is said that there was an "omission or error in the description of the interest," and that upon payment of an increased premium to be arranged the plaintiff could have had his car covered by the policy. There is a fatal objection to that contention. In *Thames and Mersey Marine Insurance Co.* v. *Van Laun* (1) the House of Lords, affirming the judgment of Kennedy J., held that the assured could not avail himself of the clause unless within a reasonable time after he knew of the omission or error he gave notice thereof to the underwriters.

(1) See note at end of this report, post, p. 48.

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It is an implied term of the contract that the assured shall give notice to the underwriters within a reasonable time after he knows of the omission or error. I regret that the case is not reported on this point. The decision is obviously right, because the natural tendency of an assured is to wait and see if the matter goes through all right, and only in the case of a loss happening to give notice to the underwriters. In order to meet that tendency the stipulation as to notice is implied. In the present case when the defendants knew that the car was being shipped on deck no notice thereof was given to the underwriters until after the loss. That is not within a reasonable time within the decision of the House of Lords. That is sufficient to decide this case, and it is the only point which I decide. I agree that the defendants would have found themselves in a difficulty because probably they could not have proved that they could have effected an insurance on a car carried on deck. I think also that the construction of clause 4 of the Institute Cargo Clauses is very difficult. It may have to be considered fully some day, and I will not speculate upon its meaning. I may, however, express a hope that the committee of underwriters will consider the clause and make up their minds as to the meaning they wish to attach to it, and express that meaning in language which an ordinary assured will understand.

Appeal dismissed.

Solicitors for plaintiff: *Capel Cure & Ball.*
Solicitor for defendants: *Richard Brooks.*

Note.

[HOUSE OF LORDS.]

July 24, 1905.

THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED *v.* H. T. VAN LAUN & CO.

[1901 V. 772.]

THE action was brought by the respondents, H. T. Van Laun & Co., to recover moneys alleged to be due to them from the appellants under two policies of marine insurance dated respectively December 3 and 4, 1900. The facts of the case were complicated, but for the purposes of this note it is sufficient to state them as follows :—In July, 1900, the German Government required a supply of cattle and sheep for

their troops in China, and they accordingly by their proper officer entered into a contract with Meyerink & Co., of Hamburg, for two shipments, one in September and the other in October, 1900, of cattle and sheep from Australia to Tsingtau or other ice-free port in North China as required at a c.i.f. price. On August 11, 1900, Meyerink & Co. entered into a contract with Frederick Beyer, of London, whereby Beyer undertook towards Meyerink & Co. substantially the same obligations as those undertaken by Meyerink & Co. in their contract with the German Government. On August 13, 1900, Beyer entered into a contract with the respondents relating to the October shipment, whereby the respondents agreed to provide the cattle, and also if practicable the sheep, for the October shipment and the steamer for their carriage from Queensland to Tsingtau or other port in Northern China, as declared on sailing of the steamer, at a certain price per head to include cost of conveyance and insurance, fodder, attendants, and all requisites for the conveyance of the animals. On September 11, 1900, the respondents by a time charter secured a steamer, and in November caused to be shipped on board at the Queensland ports of Brisbane and Bowen 705 bullocks and 611 sheep. The port of destination was stated in the bills of lading to be Taku. The respondents then through their insurance agents effected the two policies in question with the defendants (the appellants), one in London and the other in Liverpool, each being expressed to be a policy of insurance on 705 bullocks and 611 sheep, and covering the risk of mortality from any cause during transit. Each contained the usual adventures and perils clause, and a warranty free of capture, seizure, and detention and the consequences thereof or of any attempt thereat. The London policy described the voyage as "at and from Sydney and/or port or ports in New South Wales and/or Queensland ports to the vessel's port or ports of discharge in China"; the Liverpool policy described the voyage as "at and from Sydney and/or New South Wales and/or Queensland ports to China ports." The London policy gave the vessel liberty "to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all necessary purposes." The Liverpool policy gave liberty "to proceed to and call at any ports or places on this side and beyond the port of destination backwards and forwards for all purposes." In the London policy there was a clause that "in the event of any deviation from the terms and conditions of this policy (p/a clause excepted) it is understood and agreed that notwithstanding such deviation the interest hereby insured shall be held covered at a premium to be arranged." In the Liverpool policy the corresponding clause was: "Held covered in case of deviation or change of voyage provided notice be given and any additional premium required be agreed immediately after receipt of advices." On November 26, 1900, the steamer sailed from Bowen and on December 16 she arrived at Wei-hai-wei. Her master there received confirmation of the advice which he had received from a passing steamer that the port of Taku was blocked by ice. He thereupon anchored in the inner harbour at Wei-hai-wei, and communicated with his owners, who on

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the 17th or the 18th directed him to do nothing without orders. He accordingly remained there. Meanwhile on December 4 the German authorities had informed Meyerink & Co. that the cargo, having been shipped in November instead of October, would not be accepted, and legal proceedings were threatened. On December 20 the plaintiffs communicated with their insurance agents, stating that, although they thought that the delay at Wei-hai-wei did not constitute a deviation, it would be well if they mentioned the matter to the underwriters, and they stated further that they were ready to pay such extra premium as might be necessary. The insurance agents, however, did not inform the underwriters as to this matter of deviation until December 31, when they gave the underwriters notice of the suggested deviation and also notice of abandonment, and claimed for a total loss as hereinafter mentioned. While the vessel was at Wei-hai-wei the rate of mortality of the cattle increased owing to the accumulation of manure which the authorities did not allow to be thrown overboard. On December 25 the vessel went to Chefoo to get water, and she lay there, waiting orders, until January 3, when she went to Woosung. On January 16 she was brought up the Yangtse to a loading berth at Shanghai. In the meantime rinderpest had broken out, and a large number of the cattle died. Some of the cattle were landed, but later the discharge was stopped, and the Chinese authorities ordered the cattle to be taken out to sea and slaughtered, which was done. The respondents claimed for a total, or alternatively for a partial, loss.

The case was tried before Kennedy J. and a special jury in November, 1902, when the jury were asked four questions, but they were unable to agree as to the answers to three of them, the fourth question being: Were the plaintiffs ready and willing to pay extra premiums for deviation? And this question the jury answered in the affirmative. Kennedy J. on further consideration held there was no sufficient proof of actual abandonment of the insured voyage. But he held that, if there was no change of voyage, there was a deviation, if not as to the course of navigation on the voyage insured, as to the time in which the voyage ought to have been completed, and that the plaintiffs could not avail themselves of the "held covered" clauses in the policies. As to the Liverpool policy, it could not be said that notice had been given "immediately after receipt of advices." As to the London policy, it was an implied term of the provision—the interest "shall be held covered at a premium to be arranged"—that the communication to the underwriters in order that the premium may be arranged should be made by the assured within a reasonable time, and no tribunal could hold on the facts that the plaintiffs had fulfilled their obligation by not giving notice to the defendants until December 31, when they had information as to the position of the cargo on December 17 or 18. He accordingly gave judgment for the defendants. The Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.) ordered a new trial except as to certain issues. The defendants appealed.

Scrutton, K.C., and *Maurice Hill*, for the appellants.

J. A. Hamilton, K.C., and *J. R. Atkin*, for the respondents.

LORD HALSBURY L.C. (after stating that their Lordships were not in the same difficulty as the Court of Appeal, because the parties had agreed that, if questions of fact occurred to their Lordships as questions which ought to have been left to the jury, such questions should be decided by their Lordships to avoid the expense of a new trial; and after stating that the whole question of the defendants' liability might be determined by the solution of the question whether there was an abandonment of the voyage or such a deviation as was fatal to the liability of the underwriters; and after referring to the facts, continued:) For my own part I should be prepared to find as a fact that the voyage was abandoned, and that the real object of keeping the master waiting for orders was to see whether the cattle could not be disposed of to greater advantage than by attempting to deliver them in pursuance of the bills of lading. But in any event there was a clear deviation, and as in this respect there is a difference between the two policies to which I referred before, the case of each policy requires to be treated separately.

In the Liverpool policy it is provided that in case of deviation or change of voyage the assured are to be held covered, provided notice be given and any additional premium required be agreed immediately after the receipt of advices. On December 17 the plaintiffs knew that the port of discharge, Taku, was closed, and that the ship was waiting at Wei-hai-wei, and it was not until the last day of the year that the plaintiffs' agents gave any notice at all. I certainly find as a fact that that condition was not complied with so as to cure the deviation.

In respect of the London policy the language is not the same, but I agree with Kennedy J., and so find as a fact, that the notice was not given within a reasonable time, and that it is an implied term of the provision that reasonable notice should be given that it is not competent to the assured to wait as long as he pleases before he gives notice and settles with the underwriter what extra premium can be agreed upon. I take Kennedy J.'s view. I adopt his language where he says: "Reasonableness in such a matter as to the time of giving a notice depends of course upon the particular circumstances of the case. Here the subject-matter of the insurance was cattle on shipboard, in the winter season off a coast where, except at a few places, neither water nor fodder could easily be obtained, and then obtained only at serious risk, as the events have proved, of infection from disease. Every day of delay diminished the supply of both food and water, and helped to fill the cattle-pens with manure, creating a state of things which both weakened the health of the cattle and disabled with sickness the cattle-men whose duty it was to attend upon the animals. Interpreting the clause in question, as I do, to imply an obligation, in order to obtain the advantage which it confers upon the assured, that the assured should communicate as to the arranging of the premium within a reasonable time after obtaining advices, I have come to the conclusion that no tribunal could hold upon these facts that the plaintiffs fulfilled the obligation, seeing that, having the information which they had as to the position of the cargo on December 17, at any rate on December 18, they nevertheless made no

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communication to the defendants as to deviation, although they had earlier communicated with their agents, until, through the agents, they communicated on December 31, 1900. 'Reasonable time' in such circumstances surely must be comprised within much narrower limits than those of any such protracted period."

As I have already said, we are not in the difficulty felt by the Master of the Rolls that this was a question of fact, and I answer it without any doubt or difficulty that no notice was given within a reasonable time. . . . . I think what has been said is enough to relieve the underwriters from any liability after the arrival of the ship at Wei-hai-wei, and I move your Lordships that the judgment of Kennedy J. be restored with the usual consequences as to costs.

LORD MACNAGHTEN. My Lords, I have had the advantage of reading in print and considering the judgment which has just been delivered by my noble and learned friend on the woolsack, and I entirely agree with it. I should have agreed with it if it had been merely to the effect that the voyage had been abandoned. It appears to me that the risk which is sought to be imposed upon the underwriters is a totally different risk from that which they undertook.

LORD DAVEY, after referring to the facts shortly, and saying that the question in substance was whether the mortality which took place during the detention of the ship at Wei-hai-wei and Chefoo and afterwards until the ship was ordered away from the berth at Shanghai was within the risk insured by the appellants, and that in his opinion it was not, proceeded: The counsel for the respondents argued that it is a question for business men what time a master of a ship is to take to find out what was a safe port to go to. Mathew L.J. says that the duty of the master, being unable to complete his voyage in the ordinary way, was that he should behave reasonably, having regard to the interests of all parties concerned. And the learned judge holds that there was evidence for the jury that the master had behaved reasonably and used proper discretion in the matter. On this point it is pertinent to inquire what was the cause of detention, and whether that cause was anything connected with the navigation of the ship or safety of the cargo, such as might be presumed to operate on the master's mind. The evidence shows that the cause of the delay was something quite different. The respondents were, no doubt, in a difficulty. There was a triangular dispute going on between them and Meyerink & Co. and the German Government, who repudiated their liability to accept delivery of the cargo. The respondents were endeavouring to compel either the Government or Meyerink & Co. to do so, or looking about to find some means of otherwise disposing of the cargo for their own advantage. But how did these disputes affect the liability of the insurers? The master might as well have taken his ship to Shanghai at once from Wei-hai-wei as a month later, and landed his cargo there. The appellants say, and I think it is apparent, that the master exercised no discretion in the matter, but under the orders of the respondents allowed

his vessel to be used as a warehouse for the cattle until the disputes between the parties concerned should be arranged, or the respondents should find some other means of disposing of the cargo, and did not proceed to any port of discharge until the state of things had become so intolerable that he was compelled to do so. It is immaterial to consider whether there was a question for the jury, because the parties have agreed to leave all questions of fact arising on the evidence to your Lordships instead of asking for a new trial.

Kennedy J. held that there was a deviation (if not as to the course of navigation on the voyage insured) as to the time in which the voyage ought to have been completed. It was, he says, for no purpose of the voyage insured that the ship was detained at Wei-hai-wei or sent to Chefoo and detained there. But the learned judge held that there was no abandonment or change of the voyage insured. It is often a nice question on the facts whether an interruption of the voyage amounts to a deviation only or is a change of voyage. The usual test is whether the ultimate terminus ad quem remains the same. In the present case it may be doubted whether the detention of the ship at Wei-hai-wei and Chefoo, not for any purpose connected with or for the purposes of the voyage insured, but for the reason and under the circumstances disclosed by the evidence, did not amount to an abandonment of that voyage. It may be that Shanghai was a port to which the master might have taken the ship when he found that the port of Taku was ice-bound, but he went there, and was in fact ordered to go there, for a purpose different from that contemplated in the original voyage. But however this may be, I agree with Kennedy J. that it was certainly a deviation from the terms and conditions of the policies, within the meaning of those instruments, and I also agree with him that no notice was given to the underwriters of the deviation or change of voyage (if there was one) either immediately or within a reasonable time after the receipt by the respondents of advices as to the ship's movements so as to enable an additional premium to be agreed upon. The respondents knew of the ship's arrival on December 17 or 18, and on the 21st the master received orders to remain at Wei-hai-wei until further order, but no notice reached the underwriters until December 31, and, having regard to the nature of the risk insured and the increase of risk to a cargo of this character occasioned by such orders, I am of opinion that the notice was not given in a reasonable time. I have therefore come to the conclusion that the appellants were discharged from all liability under their policies from the date of the arrival of the ship at Wei-hai-wei. . . . . I have been asked by my noble and learned friend Lord Robertson, who is unable to be here to-day, to say that he concurs in the judgment which has been proposed from the woolsack.

LORD JAMES OF HEREFORD. My Lords, for the reasons which have been given by my noble and learned friend on the woolsack and my noble and learned friend Lord Davey, I think this appeal should be allowed and the judgment of Kennedy J. restored. I also agree with the view which my noble and learned friend Lord Macnaghten has

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expressed that there was here really an abandonment of the voyage, and not a mere deviation within the meaning of the policies.

Appeal allowed and judgment of Kennedy J. restored.

Solicitors for appellants: *Waltons, Johnson, Bubb & Whatton.*
Solicitor for respondents: *H. W. Chatterton.*

W. F. B.

1917 *Feb.* 28.

THOMAS SMAILES & SON *v.* EVANS & REID, LIMITED.

Ship—Charterparty—Hire—Cessation of while Working of Vessel prevented by Damage until Vessel again "in an efficient state to resume her service."

By a charterparty it was provided that "in the event of loss of time from . . . . damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service." After the vessel had loaded a portion of her cargo, and while she was proceeding from one loading place to another, she went aground, and although, after the discharge of a part of the cargo, she was eventually got off, it was found that she was seriously damaged. The master therefore decided to discharge a further portion of the cargo, and he did so at a place some miles distant from where the vessel grounded, and thereupon the vessel proceeded to the nearest port of refuge where the necessary repairs could be effected. At that port the repairs were completed, and the vessel left the dry dock on October 18. She then proceeded back to the two places where portions of the cargo had been discharged, and reloaded those portions, the reloading being completed on October 30. The charterers contended that after the grounding hire ceased to be payable until the whole of the discharged cargo had been reloaded:—

Held, rejecting this contention, that the vessel was "in an efficient state to resume her service" when the repairs were finished, and consequently, that hire again became payable from that time.

AWARD stated by arbitrators in the form of a special case.

By a charterparty dated July 30, 1915, made between Thomas Smailes & Son, Whitby (hereinafter called "the owners"), and Evans & Reid, Limited, Cardiff (hereinafter called "the charterers") the owners chartered the steamship *Carisbrook* to the charterers on time charter for two round voyages from the United Kingdom to Newfoundland, Northern States of America or Gulf of Mexico, and

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back to the United Kingdom. The charterparty contained, inter alia, the following clauses: "That the charterers shall provide and pay for all the coals, fuel, port charges . . . . "; "that the charterers shall pay for the use and hire of the said vessel at the rate of 4000*l.* per calendar month, commencing on and from the time of her delivery in the Mersey, and at and after the same rate for any part of a month, hire to continue from the time specified for commencing the charter until her redelivery to owners . . . . at a coal port on the west coast of United Kingdom"; "that in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense." The charterparty also contained an arbitration clause.

The *Carisbrook* was duly delivered to the charterers and proceeded on her first voyage to load a cargo of timber at ports in Newfoundland. After she had loaded a considerable portion of her cargo, and while proceeding from one loading place to another, she went aground in Little Bay at 3.55 P.M. on September 13, 1915, and although, after discharge of a portion of the cargo, she was eventually got off, it was found that she was seriously damaged in the bottom, and the master therefore decided to discharge a further portion of the cargo so as to bring the vessel on an even keel in order that he might proceed to St. John's, Newfoundland, which was the nearest port of refuge where the necessary repairs could be effected. The steamship accordingly proceeded to North West Arm, about twenty miles distant, where a further portion of the cargo was discharged and she then proceeded to St. John's, where she was dry docked and the necessary temporary repairs effected. Those repairs were completed at 11 A.M. on October 18, and she then proceeded from the dry dock to a coaling berth to take in bunkers. She finished taking in bunker coal at 10.30 P.M. on October 19, and, on October 20, at 6.30 A.M., she left St. John's and proceeded back to North West Arm, where she arrived at 9.45 P.M. on October 21. The reloading of the cargo which had been discharged there was commenced at

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7 A.M. on October 23 and completed at 4.45 P.M. on October 26. At 6.45 A.M. on October 27 she proceeded to Little Bay to load the other portion of the discharged cargo. She arrived there and commenced to reload that cargo at 11.15 A.M. on the same day. The reloading of the whole of the discharged cargo was completed at 8.30 A.M. on October 30.

Disputes having arisen between the parties as to the time during which the vessel was off hire, the matter was referred to arbitration.

The owners contended that the vessel was efficient for all purposes at 11 A.M. on October 18, when the temporary repairs were finished and the vessel came out of dry dock; that the reloading of the cargo was not part of the work of making the ship efficient, and that therefore the hire was payable during the time the reloading was taking place; and that the payment of hire only ceased from 3.55 P.M. on September 13 (when the vessel went aground) until 11 A.M. on October 18.

The charterers contended that after the stranding hire ceased to be payable until the discharged cargo was reloaded, as upon the true construction of the charterparty the vessel was not in an efficient state to resume her service until the discharged cargo had been so loaded.

The arbitrators held and decided (subject to the opinion of the Court) that hire ceased to be payable respectively from 3.55 P.M. on September 13, 1915, when the accident took place, until 11 A.M. on October 18, when the temporary repairs were completed, from 9.45 P.M. on October 21, when the vessel arrived at North West Arm, until 4.45 P.M. on October 26, when the cargo discharged there had been reloaded, and from 11.15 A.M. on October 27, when she arrived at Little Bay, where the other portion of the cargo had been discharged, until 8.30 A.M. on October 30, when the reloading of that cargo was completed, and they awarded accordingly.

The question for the opinion of the Court was whether the arbitrators' decision was correct.

Inskip, K.C., and *Raeburn*, for the owners. The vessel was in "an efficient state to resume her service" when the repairs were completed, namely, at 11 A.M. on October 18, and the hire began again to run continuously from that time.

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[BAILHACHE J. Is it sufficient that the vessel is seaworthy where she lies ?]

Yes. When the ship is able to be used as a ship, and not merely as a warehouse as was the case in *Hogarth* v. *Miller* (1), she is "efficient." The principle laid down in *Vogemann* v. *Zanzibar Steamship Co.* (2) is applicable here. In that case the charterparty provided that in the event of loss of time from, inter alia, "detention by average accidents to ship," the payment of hire should cease for the time thereby lost. An average accident occurred to the ship while on a voyage from Hamburg to New York, and she put back to Queenstown for repairs. After being repaired she resumed her voyage, and it was held by the Court of Appeal that the charterer was liable to pay hire during the time which elapsed between her sailing from Queenstown, after repairing, and her arrival at the place where the accident, which necessitated the repairs, took place.

Leck, K.C., and *R. A. Wright*, for the charterers. Applying the principle laid down by Lord Halsbury L.C. in *Hogarth* v. *Miller* (1) that the hirer of the ship is by such a clause guarding against the obligation to pay hire during such period of time as he shall lose the use of the ship by reason of any of the specified contingencies, it is clear that the "service" referred to in the clause is the service to be rendered to the charterers, namely, the carrying of cargo. The clause in the charterparty under consideration in *Vogemann* v. *Zanzibar Steamship Co.* (2) was in different terms from the clause now under discussion. There no question arose as to the vessel "resuming her service"; the clause excused the charterer from paying hire during the time lost by causes "preventing the full working of the vessel." Here there are the additional words "until she be again in an efficient state to resume her service," and certainly the vessel did not "resume her service" till she had reloaded the whole of the cargo that had been discharged.

BAILHACHE J., after stating the facts and referring to the contentions and the arbitrators' findings, said: I have been referred to two authorities as assisting me to some extent in the construction of the clause in question—*Hogarth* v. *Miller* (1) and *Vogemann* v. *Zanzibar Steamship Co.* (2) In *Hogarth* v. *Miller* (1), where the

(1) [1891] A. C. 48. (2) (1902) 7 Com. Cas. 254, 256.

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Bailhache J.

clause in the charterparty was practically identical with the clause now in question, the facts were that in the course of her voyage the vessel's high-pressure engine broke down, and, as she was unable to complete the voyage under her own steam, she had to be towed, although she assisted the towage to some extent by means of her low-pressure engine. On arrival at the discharging port her cargo was discharged, her steam winches and machinery being efficient for that purpose. The question was whether she was on hire during these periods. The House of Lords held that she was not in an efficient state to resume her service while it was necessary for her to go from one place to another and she was unable to do so by her own unaided power; but they also held that when she reached port where all that had to be done was to discharge her cargo hire again became payable as the discharge could be effected as efficiently from her as from the most seaworthy vessel. From that decision it appears that in considering whether a ship is "efficient" within the meaning of such a clause as this the particular service has to be considered which she has to render at the given time. If she is able to render the service she is required to render then and there, she is "efficient" for that purpose. *Hogarth* v. *Miller* (1), however, has no special bearing upon the point I have to decide. The case that has a much closer bearing upon it is *Vogemann* v. *Zanzibar Steamship Co.* (2) There the question, as stated by Collins M.R., was "whether the charterer is relieved from paying for the hire of the ship during the time which elapsed between her sailing from Queenstown after repairing and her arrival at the place where the accident, which necessitated the repairs, took place." The vessel had met with an accident and had to put back for repairs which took some time. During that period she was off hire. After the repairs were completed it took the vessel some time to get back to the place where the accident happened, and the question was whether she was off hire till she reached that place. The Court of Appeal held that she was not. In that case the words of the clause were not quite the same as those I have to construe; they were these: "That in the event of loss of time from deficiency of men or stores, breakdown, or damage of machinery or damage to rudder or propeller, grounding, but not in river, detention by average

(1) [1891] A. C. 48. (2) 7 Com. Cas. 254.

accidents to ship or cargo, or by other cause preventing the full working of the vessel (loading and/or discharging cargo), the payment of hire shall cease for the time exceeding twenty-four hours thereby lost." In this case the clause does not excuse the payment of hire during time lost by damage "preventing the full working of the vessel"; it says that hire is not payable "until she be again in an efficient state to resume her service." *Vogemann* v. *Zanzibar Steamship Co.* (1) is not so strong against the contention of the present charterers as at first I thought it was, for, as Mr. Leck has pointed out, it is one thing to say that a vessel is "in full working order" and another thing to say that she is "in an efficient state to resume her service." In this case the vessel was, as a vessel, undoubtedly in an efficient state at 11 A.M. on October 18, that is to say, she had had her temporary repairs completed, and was ready to sail the seas as a seaworthy ship. But was she in an efficient state "to resume her service"? Mr. Leck contends that until the cargo was reloaded she was not. I cannot agree. I think she did in fact resume her service the moment she was efficient to do so. It is quite true that there was time lost by the accident until 8.30 A.M. on October 30, and if the clause had said that hire should not be payable during "all time lost in consequence of an accident" Mr. Leck's contention would, I think, have been right. But that is not the language used. The clause which I am construing does not give the charterers a complete indemnity for time lost under the circumstances that occurred in this case. The contention of the owners is right, and the award must be varied in accordance with the view I have expressed.

I ought perhaps to add that no question was raised on either side as to the time occupied in bunkering, that is from 11 A.M. on October 18 to 10.30 P.M. on October 19.

Award varied.

Solicitors for owners: *Botterell & Roche.*

Solicitors for charterers: *Winn-Jones & Co., for F. Vaughan, Cardiff.*

(1) 7 Com. Cas. 254.

J. S. H.

C. A.
1917
March 2.

[IN THE COURT OF APPEAL.]

In re A DEBTOR.

Ex parte THE PETITIONING CREDITOR.

Bankruptcy—Debt to Money-lender—Final Judgment—Petition for Receiving Order—"Harsh and unconscionable transaction"—"Excessive interest"—Power of Court to reopen Transaction—Good Petitioning Creditor's Debt—Right to Receiving Order—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-ss.* 1, 3—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 5; *s.* 6, *sub-s.* 1; *s.* 109.

A money-lender who had advanced money to the debtor, part of which she had repaid, recovered judgment against her by default for the balance of principal and interest which he claimed to be due. She paid further sums in reduction of the debt, and he served her with a bankruptcy notice in respect of the balance due under the judgment. The creditor then presented a bankruptcy petition founded upon non-compliance with the notice, the validity of which was not disputed. On the hearing of the petition the debtor disputed the debt, and claimed relief under the Money-lenders Act, 1900, on the ground that the transactions between the petitioning creditor and herself were "harsh and unconscionable." The registrar held that to be established, and he fixed, as the amount properly due to the creditor, a sum considerably in excess of 50*l.* He, however, refused to make a receiving order, but adjourned the petition with leave to the creditor to amend and re-present it in order to give the debtor an opportunity of discharging the debt:—

Held, that the registrar had power, on the petition, to reopen the transaction under the Money-lenders Act, but that having found there was a good petitioning creditor's debt, namely, a debt exceeding 50*l.*, he was bound to make a receiving order, and that his order adjourning the petition was not a judicial exercise of his discretion against which there was no appeal.

In re a Debtor [1903] 1 K. B. 705 discussed and applied.

APPEAL from one of the registrars in bankruptcy.

On various dates during the year 1915 the debtor borrowed from the petitioning creditor (a money-lender) sums amounting to 600*l.*, in respect of which advances she gave him promissory notes for 850*l.* She paid various sums in reduction of the debt, but on December 1, 1915, the petitioning creditor obtained final judgment

against her in default of appearance for 710*l.* 15*s.* 2*d.* On December 13, 1915, he served her with a bankruptcy notice for the amount of the judgment debt. On December 15, 1915, she paid him 300*l.*, partly in consideration of his not proceeding to enforce the judgment for three months, and partly in payment of the debt. The creditor appropriated the 300*l.* as follows:—250*l.* "for extra interest as agreed," 10*l.* for "agreed costs," and 40*l.* part payment of the debt. On December 14, 1916, he served the debtor with a bankruptcy notice for 660*l.* as being the balance of the amount then due under the judgment. On December 29, 1916, the bankruptcy notice not having been complied with, the creditor presented a bankruptcy petition against the debtor asking for a receiving order. The bankruptcy notice was not questioned, but the debtor gave notice of intention to dispute the debt and to claim relief under the Money-lenders Act, 1900.

On the hearing of the petition the registrar held that the transactions constituted a "harsh and unconscionable bargain" within s. 1 of the Act, and fixed the amount claimable by the creditor at 280*l.* plus 160*l.* for compound interest at 20 per cent. Under these circumstances he refused to make a receiving order, but adjourned the petition, and gave leave to the petitioning creditor to amend and re-serve it on the debtor so as to give her an opportunity of satisfying the true amount of the claim. The petitioning creditor appealed.

E. W. Hansell, for the appellant. Calculating the amount of the claim at the lowest figure, there is here a good petitioning creditor's debt and the registrar ought to have made a receiving order. Assuming that a "harsh and unconscionable bargain" is established, the petitioner is entitled to a receiving order as on a claim for such sum as the Court may think that he is entitled to.

The Court of Bankruptcy has power to go behind a judgment and reopen a transaction which it considers "harsh and unconscionable" within the Money-lenders Act, 1900, s. 1, sub-ss. 1 and 3 (1), and to

(1) The Money-lenders Act, 1900, s. 1: "(1.) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act . . . . and there is evidence which satisfies the Court that . . . . the transaction is harsh and unconscionable, or is otherwise such that a

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A DEBTOR, *In re.* THE PETITIONING CREDITOR, *Ex parte.*

give relief under the Act upon the hearing of a bankruptcy petition founded upon the judgment: *In re a Debtor.* (1) When the Court goes behind the judgment, what it has to consider is whether there is a good petitioning creditor's debt, i.e., a debt amounting to 50*l.*: Bankruptcy Act, 1883, s. 6, sub-s. 1. There is an ample debt here for principal alone, however extortionate the interest may be. The registrar improperly adjourned the petition in order to give the debtor an opportunity of paying what he held to be the true amount of the claim. That was contrary to principle, inasmuch as where there is an available act of bankruptcy and a petition has been presented the creditor is not bound to accept payment of the debt: *In re Lowe* (2); *In re Gentry.* (3)

A bankruptcy notice founded upon a final judgment is not invalidated merely because it claims more than may ultimately be found due upon a reopening of the transaction: Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*). The submission is (1.) that there is here a good petitioning creditor's debt, and (2.) that the order of the registrar was futile, because if before the expiration of the period of adjournment the debtor tenders payment of the debt the petitioning creditor will be entitled to refuse to accept it.

Comyns Carr, for the respondent. The bankruptcy notice was bad. It over-stated the amount due and was altogether wrong: *In re a Debtor.* (4)

[LORD COZENS-HARDY M.R. That point was not taken before the registrar. Are you entitled to take it now?]

Yes, because until the transaction was declared to be "harsh and unconscionable" there was no objection to it. The registrar had a discretion to adjourn the petition under the Bankruptcy Act, 1883, s. 109. (5) Having now ascertained the proper sum for which

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Court of Equity would give relief, the Court may re-open the transaction . . . . "

"(3.) On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money."

(1) [1903] 1 K. B. 705.

(2) (1890) 7 Morr. 25.

(3) [1910] 1 K. B. 825.

(4) [1908] 2 K. B. 692.

(5) Bankruptcy Act, 1883, s. 109. "The Court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition,

the bankruptcy notice ought to have been served, the debtor can ask to set it aside on the ground that it was bad. It is not suggested that the petitioning creditor is bound to accept payment of the debt while the act of bankruptcy is available, but it is quite usual for the creditor to accept payment from a friend of the debtor, so that other creditors are not prejudiced. The debtor had to meet a claim for 660*l.* The registrar found that the true amount was 440*l.* On that basis the debtor might have been able to show that she was in a position to discharge the debt in full. That was a "sufficient reason" for the adjournment and refusal to make a receiving order.

[No reply was called for.]

LORD COZENS-HARDY M.R. This is an appeal by the petitioning creditor raising a curious and an important point of law. The petitioning creditor is a money-lender. He had had several transactions with the debtor which resulted in this, that cash advances were made by him to the debtor with respect to which some small sums have been paid off, but a large amount of interest was claimed by him. Judgment was obtained for an amount, in round figures, of 710*l.* in December, 1915, and a bankruptcy notice was eventually served for the amount of the judgment debt, following, in that respect, precisely the language of the Bankruptcy Act, 1883. That bankruptcy notice was for an amount of 660*l.*, giving credit for certain sums which had been paid off. The bankruptcy notice was not complied with, and therefore on December 23 there was an available act of bankruptcy. That has not been really questioned. A petition was then presented on December 27 in the usual form based upon the act of bankruptcy, namely, the non-compliance with the bankruptcy notice. No attempt was made to impeach the validity of the bankruptcy notice. I do not mean it to be supposed, by saying that, that I think in the circumstances of this case the bankruptcy notice could not have been questioned. However, it was not questioned, even if it could have been. But the debtor, when the matter came on for a receiving order, gave

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either altogether or for a limited time, on such terms and subject to such conditions as the Court may think just."

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notice to dispute the debt, and she said: This is a proceeding which is harsh and unconscionable within the meaning of the Money-lenders Act, 1900, and that is my defence. On the "harsh and unconscionable" point the learned registrar thought that it was established, but he said, looking merely at the actual cash advances, giving credit for every payment which she had made, he was satisfied that much more than 50*l.* was due. The amount which he fixed was 440*l.*, of which 280*l.* was for principal. But he further says this: I think that the debtor has been attacked by the money-lender in a manner which was not quite fair and right, because he put the debtor's judgment debt at a figure which may, in proper proceedings, be reduced. Of course the registrar in bankruptcy cannot set aside the judgment; he cannot restrain an execution upon a judgment, but, according to the decision of this Court in *In re a Debtor* (1) he can say, and, in the view of the Court of Appeal, ought to say, if there is any question whether the petitioning creditor's debt will, when the Money-lenders Act is applied to it, be below 50*l.*, that that altogether destroys the right of the petitioning creditor to a receiving order. That case was before this Court nearly fourteen years ago, and the main point that was decided was the very important one whether the view taken by Ridley J. in *Wilton & Co.* v. *Osborn* (2) was right that, under the Money-lenders Act, 1900, no transaction could be set aside unless it was such that a Court of Equity would have set it aside. That decision was disapproved in this Court, and the law is now settled that a harsh and unconscionable transaction can be set aside even though not such as in respect of it a Court of Equity would have given relief before the Act. We have seen the file of the proceedings in that case, and it appears that the petitioning creditor's debt was with costs 64*l.*; and it was alleged that interest had been charged on one loan at the rate of 200 per cent. per annum and on another at not less than 80 per cent. There was therefore the strongest possible ground on the face of things for saying that the debt of 64*l.* would be likely, as a matter of fact, if the Money-lenders Act were applied, to be reduced below 50*l.*, and this Court held, and the decision binds us, that the Court of Bankruptcy has the right to combine with the bankruptcy proceedings an application under the Money-lenders Act, 1900. We

(1) [1903] 1 K. B. 705. (2) [1901] 2 K. B. 110.

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did not send that case back to the registrar to consider what was the amount due, but only to ascertain whether the amount due to the petitioning creditor exceeded 50*l.*, that being one of the statutory conditions required before the petition can be presented and a receiving order made upon it. We have seen the order which was made by the Court, and it is quite clear upon that point, though it does not seem to have been argued in the Court of Appeal, our attention being directed to the much more important point of the general operation of the Act. Nevertheless the case seems to be a clear decision upon the point—it was not a mere dictum; it was necessary to the decision itself—namely, that, for the purpose of seeing whether the statutory requirement without compliance with which no receiving order can be made has in fact been complied with, the Court of Bankruptcy may reopen the transaction under the Money-lenders Act. We did not say, and in my view we could not with any propriety have said, that it was the registrar's duty on that petition at that stage to find what was the amount in pounds, shillings, and pence of the money-lender's debt in respect of which the creditor might ultimately be entitled to prove. We simply said: Let it go back to the registrar to see whether the first of the statutory conditions has been complied with, namely, whether there was a debt due to the petitioning creditor of 50*l.*: if there was not, then, of course, the petition would be dismissed; if there was, then the prayer of the petition would be granted. But in this case the registrar has said: "Under the circumstances, although I think there is more than 50*l.* due, assuming everything else in favour of the debtor, I will not make a receiving order now; I will adjourn the petition in order that it may be amended and re-presented, stating the true figures as I have found them, and then come on again." Was that an exercise of judicial discretion against which there is no appeal? In my opinion, plainly it was not. The registrar states what he considers to be the right figure and says if the petition is amended, possibly before it comes on again the debtor may pay the money. But the petitioning creditor would not be bound to receive it. The act of bankruptcy is not disputed. He cannot be required to receive the money from the debtor after the act of bankruptcy. But it is said that the debtor's friends may come forward. If they come forward, not as a mere alias for the

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debtor, but really as friends, I dare say the appellant will not be indisposed to accept the money. But that is not before us. Can it be an exercise of a judicial discretion to say: I direct this to stand over for the petition to be amended because there is a distant hope that some of the debtor's friends may come forward? That is not a ground for refusing a receiving order in the circumstances. This is not a case of fraud. It is not a case under which no debt at all exists. It is, as it seems to me, within the principle of the decision in *In re Gentry* (1), and I think, therefore, that the appeal succeeds and that the order of the learned registrar must be reversed.

WARRINGTON L.J. I am of the same opinion. The petitioning creditor in the present case is a money-lender. He brought an action against the debtor for the amount due from the debtor to him in accordance with the bargain that they had made. He recovered judgment for the amount so due. No question was raised in that action as to the transaction being "harsh and unconscionable" within the meaning of the Money-lenders Act, 1900. The debtor paid certain sums in part discharge of the debt. The petitioning creditor then served a bankruptcy notice in respect of the balance due under the judgment. That notice was not complied with; no steps were taken with a view of disputing the validity of the notice or with a view of disputing the validity of the judgment, and it is not suggested that the judgment was obtained by fraud. Under those circumstances there was, on the bankruptcy notice not being complied with, an available act of bankruptcy, and it was competent for the present petitioning creditor, or for any creditor whose debt exceeded 50*l.*, to present a petition in bankruptcy. In the present case the petitioner was the judgment creditor who had served the bankruptcy notice, and he presented his petition. In it he alleged that the debtor was indebted to him in the balance then remaining due under the judgment. The petition came on for hearing. It seems to me that things were then in this position: Either the registrar had power, on the hearing of the petition, to reopen the bargain and say whether it was harsh and unconscionable, and, if he thought it was, then to reduce the amount claimed by the creditor, or he had no such power. If he had no such power, then

(1) [1910] 1 K. B. 825.

the creditor has proved his debt by putting in his judgment, by showing the amounts paid in part discharge of it, and thus establishing that he is a creditor for the balance. It would have been open to the registrar, of course, to accept evidence that further sums besides those alleged by the creditor had been paid in part discharge; in particular, he might have found, if he had so chosen, that the 250*l.* said to have been paid as a bonus had really been paid in part discharge of the judgment debt. But, even if he had taken that course, then the creditor would have proved a liquidated debt for a sum exceeding 50*l.* But, taking it the other way, assuming that the registrar had power to consider whether the bargain was harsh and unconscionable, and, if he thought it was, then to reopen it and fix the amount which ought to be paid, which is the course he has taken, even in that view the petitioning creditor has still established a debt of over 50*l.* It seems to me that under those circumstances the petitioning creditor has done all that it was necessary for him to do in order to require the Court to make the receiving order, which is, after all, not an order made in favour of the petitioning creditor only, but for the protection of the assets for the benefit of all the creditors in order that they may be duly administered in bankruptcy. Notwithstanding the position, which I think was the true position, the registrar adjourned the petition, and he adjourned it for a reason which he specifies in his judgment, and it is said that that was such an exercise of his discretion that this Court cannot or ought not to interfere with it.

With regard to the last point, I have nothing to add to what has been said by the Master of the Rolls; I agree with what he said as to that. I think there was no sufficient ground for the exercise of the discretion by the registrar, and there being in this case sufficient for a good petitioning creditor's debt, a debt exceeding 50*l.*, he ought to have made the receiving order.

Scrutton L.J. Probably owing to my lack of familiarity with the subject, I have felt very great doubt during the hearing of this case, and my doubt has not been lessened by the fact that I entirely sympathize with the order that the registrar made, and I think that there was a great deal of sound common sense behind it. But I have come to the conclusion that I am bound by two decisions of the

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Court of Appeal to concur in the judgment which has just been given. But as the authorities, in my view, are not in a satisfactory position, I propose to state the reasons for the conclusion to which I have come.

The debtor, a lady, borrowed money from a money-lender, who obtained judgment against her for the sum of 710*l.* As far as I can see, having tried a good many of these cases, up to the time when he got judgment there is nothing in the figures which suggests harshness or unconscionableness; at any rate, compared with many figures that I have seen, they appear to be quite respectable. After the judgment was obtained for 710*l.* the lady brought 300*l.* to the money-lender, and then he did what does seem to me a thoroughly outrageous thing. He took 40*l.* off the debt and he purported to appropriate 10*l.* for costs, and the other 250*l.*—he did not quite know what it was himself, because he sometimes calls it "interest" and sometimes a "bonus"—as a consideration for giving her three months' further time for paying the debt. That does work out at something like 200 per cent., and I think it a thoroughly oppressive and harsh and unconscionable transaction. She did not pay any more money. Thereupon, having served her with a bankruptcy notice for the amount of the balance of the judgment debt, the money-lender applied for a receiving order by a bankruptcy petition. No objection was taken to the bankruptcy notice as such, but notice was given that, on the hearing of the petition, the debtor would raise the question of relief under the Money-lenders Act. Sub-s. 3 of s. 1 of the Money-lenders Act says: "On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money." Now I confess, left to myself, I should have had some difficulty in getting out of that section a power, on a bankruptcy petition, to consider the amount of the petitioning creditor's debt, but I find that the Court of Appeal have succeeded, by some benevolent construction which is rather beyond me, in arriving at the conclusion that it does apply to proceedings on a bankruptcy petition, for in the case of *In re a Debtor* (1) the Court did send the case back to a registrar who had made a receiving order for

(1) [1903] 1 K. B. 705.

him to consider the question whether there was a petitioning creditor's judgment debt having regard to the provisions of the Money-lenders Act. Neither in the *Law Reports* nor in the other report which I have looked at is there any trace that the true meaning of sub-s. 3 of s. 1 of that Act was argued. Sub-s. 3 is not mentioned in either report, but the Court of Appeal could not have made the order it did, unless it had thought that that section did give power to the registrar, on the hearing of a petition for a receiving order, to consider the question of whether, having regard to the relief which can be given under the Money-lenders Act, 1900, there is a petitioning creditor's debt. I think, therefore, I am bound by that decision.

The next question, on which I feel considerable difficulty, is: What are the powers exactly of the registrar? One thing seems quite clear: the judgment stands; the registrar cannot alter the judgment; there is still a judgment for 710*l.*, and if the creditor proceeded to put in an execution for the judgment for 710*l.* nothing that the Bankruptcy Court did would affect the matter in the slightest degree. The execution would still go if there was a good judgment, and the Bankruptcy Court would have no power to interfere with it. Therefore, on the authorities, the decision of the registrar as to whether there is or is not a good judgment is not res judicata, because the question may be raised again by any subsequent proceedings. One would have thought, under those circumstances, but for the decision of the Court of Appeal, that the registrar had nothing to do with the amount of the judgment debt. Apart from the authorities, if an unfair use was being made of a judgment and there was a judgment which could be reduced under the Money-lenders Act, and it was proposed to enforce it by bankruptcy proceedings, I can understand the Court of Bankruptcy saying, We will not give you this remedy; take all the other remedies you can get, but we will not give you this remedy. But I find that, at any rate in two cases, the Court of Appeal have used language which shows that they think the registrar can, on these proceedings, find out what the amount of the debt should be. Both of those authorities are judgments of Lord Esher. In the case of *In re Vitoria* (1) Lord Esher points out very much what I have been saying about the position of a judgment in regard to the registrar's powers. He says: "Suppose

(1) [1894] 2 Q. B. 387, 390.

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that the registrar should come to the conclusion that the judgment was obtained by fraud; he would then have power to say that he would not make a receiving order. But he would have no power to set aside the judgment, or to stay execution upon it. The authority of a registrar in bankruptcy depends entirely upon the Bankruptcy Act, and he has no power to set aside or to review a judgment. But the Court of Bankruptcy can refuse to make a receiving order in respect of a judgment which it cannot set aside." In the other case, *In re Fraser* (1), Lord Esher says this: "The mere fact that there is a judgment in law does not prevent the registrar from considering whether there was a good petitioning creditor's debt. The Bankruptcy Court can go behind the judgment and enquire into the liability on which the debt was founded. The Bankruptcy Court does not set aside the judgment and is not called upon to do so. It goes round the judgment and enquires into the subject-matter on which the judgment is founded. It might perhaps be said that on s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, the judgment is to govern the matter, but when we come to s. 7 it shows that even if there is a judgment the Court may not be satisfied that the case is one in which it ought to make a receiving order. That was clearly decided in *Ex parte Lennox* (2), where it was held that the Court of Bankruptcy had power to go behind a judgment and enquire into the consideration for the judgment debt, not only at the instance of the trustee in bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a receiving order, even though the debtor has consented to the judgment; and if on the hearing of the petition facts are alleged by the debtor, of which evidence is rendered, and which, if proved, would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the Court ought not to make a receiving order without first enquiring into the truth of the debtor's allegations. That rule of conduct is put on the highest ground, that you are not dealing simply between a man and his creditor, but you are interfering with the rights of other creditors. Therefore it was said that the Court ought not to exercise its tremendous power

(1) [1892] 2 Q. B. 633, 636; 9 Morr. 256, 260. The quotations are from Morrell's report.

(2) (1885) 16 Q. B. D. 315.

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unless it was perfectly satisfied there is a good petitioning creditor's debt irrespective of the judgment." I take that to be a decision of the Court of Appeal which binds me, that, although there is one debt under the judgment with which the registrar cannot interfere, he may inquire whether there is another debt, a different debt from the judgment debt, which is a good petitioning creditor's debt, by which I suppose is meant a debt of over 50*l.* The effect of such a finding apparently would be only very limited ; it will not interfere with the extent of the other debt under the judgment, or the remedies under the judgment, but it will say that, for the purposes of the bankruptcy, apart from the judgment, there is a debt of over 50*l.* in respect of which a remedy can be given in bankruptcy, though it cannot be given in respect of the amount for which it is being claimed. I confess that that curious limited new debt so brought into existence does seem to me rather an anomaly, but I am bound by the decision of the Court of Appeal, which clearly recognizes that possibility, to say that the registrar can inquire into, not the judgment debt, but whether, behind the judgment debt, there is a good debt of more than 50*l.* In the case of *In re a Debtor* (1), which was sent back to the registrar, I see that he subsequently found that there was no such debt, because the petition was dismissed. In this case the registrar, having considered the matter, has found that there is a debt of over 50*l.* As far as I can see at present, the fact that the registrar says there is a debt of 440*l.* does not bind anybody, except for the purpose of saying that it is more than 50*l.* But he has found that there is a debt of over 50*l.* The next stage is this : Counsel for the debtor says the registrar has a discretion to adjourn, and that he was quite justified in adjourning, in order that the debtor might have an opportunity of paying. The registrar says, an excessive sum having been previously claimed against her, I will give her a chance of paying the sum which I really find due. I think the decisions to which my brothers have referred, particularly *In re Gentry* (2), show that if you have got a good petitioning creditor's debt the creditor cannot be forced to take it, and to direct an adjournment simply for the purpose of allowing a tender to be made is not a course which the registrar ought to take. For these reasons, which I have

(1) [1903] 1 K. B. 705. (2) [1910] 1 K. B. 825.

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endeavoured to state as fully as I could, because I do not think the matter is at all satisfactory at present, I concur in the result of judgments which have been given by my brothers, and I think the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *A. H. Freeman.*

Solicitors for respondent: *Fladgates.*

G. A. S.

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[IN THE COURT OF APPEAL.]

In re MARRIED WOMEN'S PROPERTY ACT, 1882.

In re QUESTIONS BETWEEN W. A. HUMPHERY AND H. A. HUMPHERY.

Practice—Husband and Wife—Disputes as to Property—Originating Summons under s. 17 *of Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75)—*Reference by Judge to Official Referee for Trial—Jurisdiction—Arbitration Act,* 1889 (52 *&* 53 *Vict. c.* 49), *s.* 14.

The Court has no jurisdiction under s. 17 of the Married Women's Property Act, 1882, to refer the whole subject-matter of an originating summons taken out under that section to an official referee for trial.

Quaere, whether, having regard to the special and peculiar jurisdiction conferred by s. 17 of the Act of 1882, the Court has jurisdiction to refer a matter arising under that section to an official referee for trial under s. 14 of the Arbitration Act, 1889.

APPEAL from a decision of Ridley J. in chambers.

On February 14, 1917, an originating summons was taken out by Helen Alice Humphery under s. 17 of the Married Women's Property Act, 1882 (1), against her husband, Selwyn Wollaston

(1) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17: "In any question between husband and wife as to the title to or possession of property, either party . . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England . . . . and the judge of the High Court of Justice . . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question

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Humphery, for an order determining all questions between them as to the title to and possession of certain property—namely, a house and lands known as "Seaview," situate near Oulton Broad in the county of Suffolk, a sum of 1000*l.* on deposit in the joint names of the husband and wife at the South Lowestoft branch of the Bank of Barclay & Co., Limited, a wherry and dinghey, a Wolseley motor car, a sum of money lent to a certain Mr. B. Hancock and the household furniture and effects in and about the house and grounds aforesaid, and declaring the rights of the husband and wife therein, and for incidental relief.

The wife claimed to be equally interested with her husband in the house and lands, the furniture and effects in and about the same (except the linen, which she alleged to be her own property), the wherry, dinghey, and motor car, the deposit of 1000*l.* at Barclay's Bank, and the loan to Mr. Hancock.

The husband claimed to be solely entitled to the house and lands, the 1000*l.* on deposit, and the motor car and certain of the furniture and effects.

The property in question was alleged to be of considerable value, the house and lands being stated to be of the value of between 4000*l.* and 5000*l.* and the motor car to be worth between 500*l.* and 600*l.*

On March 9, 1917, the application was heard before Ridley J. in chambers, when his Lordship made an order in the following terms: "It is ordered that the whole subject-matter of the originating summons herein dated February 14, 1917, be referred to an official referee for trial."

The wife appealed.

Disturnal, K.C., and *St. John Field*, for the appellant. Ridley J. had no jurisdiction under s. 17 of the Married Women's Property

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to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said Court would be: . . . . Provided also, that the judge of the High Court of Justice . . . . if either party so require, may hear any such application in his private room . . . ."

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Act, 1882, to make the order referring the whole subject-matter of the originating summons to an official referee for trial. He was bound to determine the questions raised by the summons himself. The section contains no provision enabling him to delegate the powers thereby conferred on him. He had all the materials before him on which he could come to a decision on the merits.

[LORD COZENS-HARDY M.R. Would you be willing that the matters should be referred to an official referee to report to the judge ?]

The questions of law and of fact in this case are so intimately associated that they cannot be separated and ought to be dealt with by the judge himself. The appellant is quite willing that the question of the furniture should be referred. We rely on *Dunbar* v. *Dunbar* (1), in which the admitted facts were not so strong as they are in this case.

[LORD COZENS-HARDY M.R. We are anxious not to go into the merits of the case.]

Colam, K.C., and *R. Fortune* (*D. M. Hogg* with them), for the respondent. It is submitted that the judge had jurisdiction to refer the matter to an official referee for trial.

[SCRUTTON L.J. Where do you get the general jurisdiction to refer ?]

It is impossible where the whole matter has to be gone into that the case should be tried piecemeal. It is clear that the matter which has to be tried is one of account. Sect. 14 of the Arbitration Act, 1889, which was passed after the Married Women's Property Act, 1882, is sufficiently wide to cover this case. The practice has been to refer disputes between husband and wife as to property to an official referee. In the present case the first thing to ascertain is when the various properties were bought and what was the intention of the parties at the time of the purchase. The matters are so inextricably mixed up with questions of account that they ought to be dealt with by the same tribunal. The judge has full power to refer under s. 14 of the Act of 1889.

Disturnal, K.C., in reply. The husband's case raises no question of account at all. Whether the money was the wife's or the husband's at a particular time depends on the date when it was paid

(1) [1909] 2 Ch. 639.

into the bank, and that can be ascertained from an inspection of the bank books. On the facts as disclosed in the affidavits there is nothing in respect of which a useful account can be taken. As regards s. 14 of the Arbitration Act, 1889, the matters in dispute are certainly not wholly matters of account. That Act has no application to s. 17 of the Married Women's Property Act, 1882, which confers a special and peculiar jurisdiction on the judge. We ask for the personal assistance of the judge in the matter. The order was wrong and the summons ought to go back to the judge to be dealt with by him.

LORD COZENS-HARDY M.R. This is an appeal from an order made by Ridley J. in chambers on an originating summons taken out by a wife under s. 17 of the Married Women's Property Act, 1882, and it raises a point of some interest. The wife, as applicant, says that there is certain property to which she and her husband are jointly entitled. The property in question is of considerable value. One item consists of a house and lands said to be of the value of between 4000*l.* and 5000*l.*; another is a sum of 1000*l.* standing in the joint names of the husband and wife at a bank, and a third is a motor car said to be worth between 500*l.* and 600*l.* The wife says that all these items are joint property, and she asks for a declaration to that effect. There is a further claim to certain furniture in the house of which there are a good many items of comparatively small value, and as to which evidence going into considerable detail may be necessary. It is conceded by the appellant that as regards the latter the matter is one on which the learned judge was entitled to have the assistance of a report. But the judge has made this order: "It is ordered that the whole subject-matter of the originating summons herein dated February 14, 1917, be referred to an official referee for trial." This is, of course, not an application in an action, but in a matter under s. 17 of the Married Women's Property Act, 1882, the provisions of which are very special and peculiar. The jurisdiction thereby given is given to a judge alone, not to a Master, and the judge may if he thinks fit "hear any such application in his private room," and may direct "any inquiry touching the matters in question to be made in such manner as he shall think fit." But I look in vain in s. 17 for any

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power given to the judge to refer the whole subject-matter of the originating summons to any other tribunal for trial. He cannot, of course, be expected to deal with all the various items of the furniture. Those are matters of detail with regard to which he is entitled to have the assistance of a report by some qualified person. But it is quite a different matter to say that it is competent for him to refer the question of ownership to the decision of an official referee.

But then we are referred to s. 14 of the Arbitration Act, 1889, and that section is said to show that the Court has jurisdiction in any cause or matter, if the question in dispute consists wholly or in part of matters of account, to order the whole cause or matter to be tried before a special referee or an official referee. I do not think it is necessary to decide the point now, but I have grave doubt whether s. 14 of the Arbitration Act, 1889, can be appealed to in any matters arising under the special and peculiar jurisdiction given by s. 17 of the Married Women's Property Act, 1882. I think the special and peculiar jurisdiction given by that section negatives the idea that s. 14 of the Arbitration Act, 1889, can be applicable. But however that may be, and even assuming that the matters in the originating summons could be referred under s. 14, there is at any rate nothing in the present case to justify the order which has been made. The items in dispute, apart from the question of the furniture, are now only three in number, and they are certainly not of such a nature as to require a reference under s. 14. If the judge should in the course of hearing the case take the view that he requires assistance on any question of account he may refer the matter to the official referee for a report.

With great respect to Ridley J., I think he has here exceeded his jurisdiction by delegating his powers as a judge in chambers to an official referee.

I think, therefore, the appeal must be allowed, and the case should go back to the judge in chambers. Care must be taken in drawing up the order, which should provide for a reference to an official referee or a Master to report as to the furniture.

SCRUTTON L.J. I agree. This originating summons is one of a kind which frequently comes before judges of the King's

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Scrutton L.J.

Bench Division. It asks for the determination of the title to six items of property—a house and the lands on which it stands, a sum of 1000*l.* on deposit in a bank, a wherry and dinghey, a motor car, a sum of money lent to a Mr. Hancock, and certain household furniture and effects. When the summons came before Ridley J. in chambers he referred the whole matter to an official referee for trial. The summons was taken out under the peculiar jurisdiction conferred by s. 17 of the Married Women's Property Act, 1882, which provides that in any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise to a judge of the High Court, and the judge may make such order with respect to the property in dispute as he thinks fit, or may direct "any inquiry touching the matters in question to be made in such manner as he shall think fit." That section seems to me to contemplate that the judge is to keep control over the whole matter and that he is to determine it. I agree with the Master of the Rolls that it is not necessary for us finally to decide whether it is ever possible for a judge to use the powers given him by s. 14 of the Arbitration Act, 1889, and send the whole matter of the summons to an official referee for trial. But, having regard to the very peculiar provisions of s. 17 of the Married Women's Property Act, 1882, I think that a very strong case would have to be made out to enable him to relieve himself of his responsibility under that section. Of the six items mentioned in the summons two of them, namely, the wherry and the dinghey, and the money lent to Mr. Hancock, are now admitted to be joint property, and as regards the furniture it has been agreed that all questions with reference to it should be referred to an official referee or a Master. There are therefore left only three items in dispute, but which are nevertheless items of considerable value, namely, the house and lands, the money in the bank, and the motor car. It may be necessary to go into accounts in respect of these items, but the matters of account are so subordinate to the questions of ownership that, in my opinion, there is not sufficient reason to justify the relegation of the whole matter to a tribunal of account.

I agree, therefore, with the Master of the Rolls that the appeal should be allowed and that those matters should go back to the

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judge in chambers to be dealt with by him. He may, if he thinks fit, direct further inquiries with regard to them. We only say that those items are prima facie such that they ought to be dealt with by the judge himself and not by a subordinate tribunal.

[It was ultimately agreed that the questions concerning the furniture should be referred to Master Chitty.]

Solicitors for appellant: *Kenneth Brown, Baker, Baker & Co.*

Solicitors for respondent: *Whitford & Thorp, for Greene & Greene, Bury St. Edmunds.*

W. I. C.

1917
March 19, 20, 30.

ANGLO-NORTHERN TRADING COMPANY, LIMITED *v.* EMLYN JONES & WILLIAMS.

Ship—Time Charterparty—Hire—Requisition of Vessel by Admiralty—Frustration of Adventure.

The doctrine of commercial frustration is applicable to time charterparties. Whether it applies to a particular time charterparty under which hire is periodically payable depends upon the circumstances, and in determining whether it is applicable the main consideration is the probable length of the total deprivation of the use of the vessel as compared with the unexpired duration of the charterparty. The party desirous of relying upon the doctrine is entitled to claim that the charterparty has been determined by frustration as soon as the event upon which the claim is based happens; the question then is, what estimate a reasonable man of business, on the materials before him, would take of the probable length of the withdrawal of the vessel from service; the actual event is not material to this question.

The doctrine does not apply when the time charterer has the use of the vessel for some purpose for which under the terms of the time charterparty he is entitled to use her, even though that purpose is not the particular purpose for which he desired to use her.

By a charterparty dated October 2, 1915, a vessel was hired for a term which would expire on November 19, 1916, the hire being payable monthly. In the event of loss of time from certain causes preventing the working of the vessel hire was to cease until the vessel was again in an efficient state to resume her service; and there was an exception clause which included, inter alia, restraint of princes, but there was no provision for cessation of hire in respect of any interruption of the services of the vessel due to that excep-

tion. On July 26, 1916, the vessel was requisitioned by the Admiralty and continued under that requisition until after November 19, 1916, the rate of hire payable by the Admiralty being considerably less than that payable by the charterers to the owners. At the time when the vessel was requisitioned no intimation was given by the Admiralty of the probable duration of the requisition. No payment of hire had been made by the Admiralty to the charterers, and no payment of hire had been made after the date of the requisition by the charterers to the owners. The charterers claimed that the requisition put an end to the charterparty :—

Held, that there was a frustration of the adventure by the requisition, and therefore that the charterers were not liable for the hire after the date of the requisition.

AWARD by an arbitrator in the form of a special case.

By a charterparty in the Baltic and White Sea Conference form dated October 2, 1915, the Anglo-Northern Trading Company, Limited (hereinafter called the chartered owners), agreed to let, and Emlyn Jones & Williams (hereinafter called the charterers) agreed to hire, the steamer *Lowdale* for a term of about eleven or twelve calendar months (say from date of delivery till September 30 or October 30, 1916), at 363*l.* 5*s.* per calendar month, commencing from the time the steamer was placed at the charterers' disposal. The payment of hire was to be made in London monthly, in advance. The charterparty provided by clause 12 that in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer for more than twenty-four consecutive hours, hire should cease until she was again in an efficient state to resume her service, and it contained an exception clause which included, inter alia, restraint of princes, but there was no provision for cessation of hire in respect of any interruption of the services of the steamer due to that exception. The steamer (unless lost) was to be redelivered on the expiration of the charterparty. By a supplemental clause it was provided that any time occupied during the currency of the charterparty in the survey of the steamer was to be added to or deducted from the above periods at the charterers' option.

The steamer was delivered to the charterers on October 28, 1915, when hire commenced, but it ceased to be payable for two periods, amounting in all to one month and nineteen and one-twelfth days, while the steamer was undergoing survey in November-December,

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ANGLO-NORTHERN TRADING COMPANY, LIMITED v. EMLYN JONES & WILLIAMS.

1915, and in May, 1916. In respect of those periods the charterparty was admittedly extended by the charterers exercising the option given them to do so. On July 26, 1916, the steamer was requisitioned by the Admiralty, and continued under that requisition until after the expiration of the period covered by the charterparty, the rate of hire payable by the Admiralty being 1529*l.* 10*s.* per month. At the time of requisitioning the steamer no information was given by the Admiralty of the probable duration of the requisition. At that time hire had been paid in advance by the charterers for the period expiring at 12 noon on July 28, 1916, but no subsequent payment of hire was made by the charterers. If the extended period of one month and nineteen and one-twelfth days (the time occupied in the survey of the steamer) was added to September 30, 1916, the charterparty would terminate at 2 A.M. on November 19, 1916. No formal redelivery of the steamer was ever made by the charterers, and at 2 A.M. on November 19, 1916, the steamer was still under requisition to the Admiralty. No payment of hire had been made by the Admiralty to the charterers, and there was no evidence before the arbitrator as to whom, if at all, it had been paid, but presumably it had been, or would be, paid to the owners. The chartered owners claimed against the charterers hire from July 28, 1916, to 2 A.M. on November 19, 1916, amounting (after giving credit for the hire, if and when received from the Admiralty) to 7782*l.* 6*s.* 4*d.*

It was contended for the chartered owners that they were entitled to hire for the whole period of the charterparty as extended, that it was the charterers' duty to collect from the Admiralty the hire payable under the requisition, and that the requisition did not put an end to or affect the rights of either party under the charterparty.

It was contended for the charterers that the Admiralty requisition put an end to the charterparty.

The arbitrator decided, subject to the opinion of the Court, that the Admiralty requisition did not put an end to the charterparty, and that the chartered owners were entitled to be paid hire until 2 A.M. on November 19, 1916, giving credit for the hire payable by the Admiralty. He therefore awarded that the charterers should pay to the chartered owners 7782*l.* 6*s.* 4*d.* If his award was correct in point of law, it was to stand; if, however, the Court should be

of opinion that the charterparty was determined by the Admiralty requisition, he awarded that the chartered owners should repay to the charterers 302*l.* 12*s.* 1*d.*, being the hire paid in advance for the period from July 26, 1916, when the steamer was requisitioned, until noon on July 28, 1916.

Leck, K.C., and *Le Quesne*, for the charterers. The charterparty was brought to an end by the requisition. The circumstances in the present case are distinguishable from those in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1), where the charterparty had a long period still to run at the time of the requisition. The effect of the requisition in the present case was that the use of the vessel was taken by the Government for the whole remaining period of the charterparty. As soon as it became ascertainable that the requisition would remain in force during, substantially, the whole period, the charterparty came to an end. The judgment of Earl Loreburn in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) is founded upon the principle that it must be ascertained whether the interruption is of such a nature as to make it unreasonable to require the parties to go on, and Earl Loreburn is in agreement with Viscount Haldane and Lord Atkinson as to that being the principle applicable. As to the application of the doctrine of frustration of the adventure to a time charterparty, Lord Parker considered that, although the application might be difficult, there is no principle of law which prevents it. All that happens subsequently must be taken into consideration in determining whether it was reasonable at the time of the requisition to forecast that it would cause commercial frustration : *Modern Transport Co.* v. *Duneric Steamship Co.* (2) ; *Scottish Navigation Co.* v. *Souter & Co.* (3) The question whether there has been commercial frustration must be determined by the party desirous of relying upon it as and when it arises, but it may possibly be that the question cannot be decided at the time it first arises, as for instance in a time charterparty where the hire is payable monthly. The position as it is possible to elucidate it by evidence may be very different on the second occasion to that which it was on the

(1) [1916] 2 A. C. 397. (2) [1917] 1 K. B. 370.
(3) [1917] 1 K. B. 222.

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first, although the question on both occasions is the same. In the present case it is now known that the requisition has continued until long after the expiration of the charterparty. The question is not affected in any way by the requisition being within the exception of restraint of princes. That is clear from *Jackson* v. *Union Marine Insurance Co.* (1), where a delay from causes within the excepted perils was held to put an end to the contract because it frustrated the adventure. [*Embiricos* v. *Reid & Co.* (2) and *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (3) were also referred to.]

Inskip, K.C., and *Raeburn*, for the chartered owners. The arbitrator has found as a fact that there was no such unreasonable interruption as put an end to the charterparty. The doctrine of commercial frustration is not applicable to a time charterparty for the reasons indicated in the judgment in *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (4) and applied by Lord Parker in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (5) Lord Parker's judgment in that case was in substance the leading judgment, because it was agreed with by the Lord Chancellor. The time at which it must be determined whether on the facts there has been a commercial frustration of the voyage is the time of the withdrawal of the vessel in consequence of the requisition : *Watts, Watts & Co.* v. *Mitsui & Co.* (6) [*Geipel* v. *Smith* (7) was also referred to.]

Leck, K.C., in reply cited *Metropolitan Water Board* v. *Dick, Kerr & Co.* (8) and *Andrew Millar & Co.* v. *Taylor & Co.* (9)

Cur. adv. vult.

March 30. BAILHACHE J. read the following judgment :—This case comes before me on a case stated by an arbitrator for the opinion of the Court. It raises once again the much-litigated question of the effect of an Admiralty requisition of a ship the subject of a time charterparty.

The facts are that the *Lowdale*, under time charterparty dated October 2, 1915, to Messrs. Emlyn Jones & Williams, was requi-

(1) (1874) L. R. 10 C. P. 125.
(2) [1914] 3 K. B. 45.
(3) [1916] 1 K. B. 429 ; [1917] 1 K. B. 222.
(4) [1916] 1 K. B. 429.
(5) [1916] 2 A. C. 397.
(6) [1917] A. C. 227.
(7) (1872) L. R. 7 Q. B. 404.
(8) Ante, p. 1.
(9) [1916] 1 K. B. 402.

sitioned by the Admiralty on July 26, 1916. The time charterparty expired on November 19, 1916, while the ship was still under requisition, and the charterers contend that the Admiralty requisition so frustrated the commercial object of the adventure as to put an end to the charterparty as from the date of the requisition. This contention was, I gather, raised as soon as the *Lowdale* was requisitioned. There is no finding to that effect, but the charterers paid no hire to the owners after July 26. The time charterparty is in the Baltic and White Sea Conference form, giving the charterers a wide choice of purposes for which the ship may be used by them. It provides, in clause 12, for cessation of hire during time lost by deficiency of men, owners' stores or accident preventing the working of the ship, and it contains an exception clause, clause 14, which includes restraint of princes, but there is no provision for cessation of hire during any interruption of the services of the ship due to that exception. The arbitrator has held, contrary to the charterers' contention, that the requisition by the Admiralty did not put an end to the time charterparty, and the question for my decision is whether he is right in so holding.

The requisition by the Admiralty was a restraint of princes, and it took the *Lowdale* entirely away from the control of both owners and charterers, and from its date the charterers had none of her services for any purpose whatever.

The authorities upon the point are difficult to reconcile, and there is such conflict of opinion on the subject among lawyers and commercial men that I reserved my judgment in the hope that I might be able to extract from the decided cases some definite rules which might serve as a guide to shipowners and time charterers, who are much perplexed to know what their respective rights are in such a case as the present, a case now of constant occurrence. I have found the task a difficult one, but with the diffidence which befits a judge of first instance, especially one whose opinion has been overruled, I venture to suggest that the law at present stands thus: (1.) The doctrine of commercial frustration is applicable to a time charterparty: see per Lords Loreburn, Haldane, and Atkinson in *Tamplin's Case* (1) and the subsequent decision of the Court of Appeal in *Souter's Case* (2) and *Weidner, Hopkins' Case*. (2) I think it impos-

(1) [1916] 2 A. C. 397. (2) [1917] 1 K. B. 222.

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sible to hold, as is sometimes contended, that the last-mentioned decisions turned solely upon the conclusion of the Court of Appeal that the charterparties in those cases were voyage and not time charterparties: see especially the judgment of Lawrence J. at p. 249. (2.) The doctrine does not apply when the time charterer has the use of the vessel for some purpose for which he is under the terms of the time charterparty entitled to use her, even though that purpose is not the particular purpose for which he desires to use her: *Brown* v. *Turner, Brightman & Co.* (1) I think that, in so far as the decision in *Weidner, Hopkins' Case* (2) seems contrary to this view, that part of the decision is founded upon the fact that Swinfen Eady and Bankes L.JJ. considered that the charterparty in that case was a voyage and not a time charterparty. I am aware that the judgment of Lawrence J. in that case cannot be explained on this ground, but, with every respect for any judgment of his, I think the law is as I have stated it. (3.) It follows that the doctrine does not apply unless the owner is unable to give the time charterer the use of the vessel for any purpose whatever within the scope of the charterparty. (4.) Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charterparty depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charterparty. (5.) This raises another question, namely, when is the party desirous of relying upon the doctrine of frustration in a position to claim his right so to do? If he does so as soon as the event happens which in his view gives him the right, its duration must be a matter of estimate, depending chiefly upon the nature of the event. The particular event with which I am concerned in this case is a requisition of the vessel by the Admiralty for an undefined period. Now there is nothing more repugnant to business men who have to look ahead and make their arrangements in advance than uncertainty as to their engagements already made. Doubt as to their contractual obligations paralyses business, and I think that in time charterparties where hire is periodically payable and failure to pay may entail the withdrawal of the vessel, and payment and acceptance of the hire, if not a waiver of the right to rely upon frustration,

(1) [1912] A. C. 12. (2) [1917] 1 K. B. 222.

at any rate extend the period of suspense, the parties must have the right to claim that the charterparty is determined by frustration as soon as the event upon which the claim is based happens. The question will then be what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials as are before him, including, of course, the cause of the withdrawal, and it will be immaterial whether his anticipation is justified or falsified by the event. This view is I think supported by such cases as *Geipel* v. *Smith* (1), *Notara* v. *Henderson* (2), *The Savona* (3), and *Embiricos* v. *Reid & Co.* (4) I should entertain no doubt of its accuracy but for the decision of the Court of Appeal in *Andrew Millar & Co.* v. *Taylor & Co.* (5), which seems to point the other way, and to indicate that the proper attitude to adopt is "wait and see." That is not, however, a charterparty case, and for the reasons given does not, in my opinion, apply to time charterparties. (6.) The decision of the Court of Appeal in the *Duneric Case* (6) does not appear to have any material bearing upon the matter in hand. Mr. Roche, in support of the appeal, expressly disclaimed any reliance upon the doctrine of frustration of the adventure. A good deal of confusion has been caused by misapprehension of this case and treating it as an authority on frustration of adventure.

These conclusions, if sound, are, I think, sufficient for practical guidance. If the principles I have stated are correct, commercial men will not care to inquire how they are arrived at, but lawyers may feel some surprise that I quote as my authority for the proposition that the doctrine of frustration of adventure applies to a time charterparty the opinions of Lords Haldane and Atkinson, who formed the dissentient minority in *Tamplin's Case* (7), and not those of Lords Buckmaster and Parker, who with Lord Loreburn formed the majority in that case. The reason is that, as I understand it, the judgment of the Court of Appeal in *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (8) has not followed the line of reasoning taken by Lords Buckmaster and Parker, nor, as I read his speech, did Lord Loreburn.

(1) L. R. 7 Q. B. 404.
(2) (1872) L. R. 7 Q. B. 225, 237.
(3) [1900] P. 252, 259.
(4) [1914] 3 K. B. 45.
(5) [1916] 1 K. B. 402.
(6) [1917] 1 K. B. 370, 373.
(7) [1916] 2 A. C. 397.
(8) [1917] 2 K. B. 222.

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The question at issue is the implication into a time charterparty of a clause providing for the determination of the contract by frustration of the adventure, which will not conflict with the express provisions of the contract. The general rule of law is, of course, that no term can be incorporated by implication into a contract which conflicts with some term expressed in the contract. Lord Parker, speaking for himself and Lord Buckmaster, points this out in *Tamplin's Case* (1), where, after referring to the terms of the charterparty in that case, terms which are the usual terms in most time charterparties, and were the same as in *Weidner, Hopkins' Case* (2), he says: "Under these circumstances it appears to me to be difficult, if not impossible, to frame any condition by virtue of which the contract of the parties is at an end without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions." I had pointed out the same difficulty in *Weidner, Hopkins' Case* (3) in a passage to which Lord Parker referred and of which he approved. The Court of Appeal in *Weidner, Hopkins' Case* (2) expressly say that my view was mistaken in that case. True it is that the majority of the Court of Appeal held that the charterparty there was a voyage and not a time charterparty, but that does not dispose of the difficulty now under consideration. The express terms of that contract being the same in this respect as in the contract in *Tamplin's Case* (4), the introduction by implication into both contracts of the same term must necessarily cause the same conflict between the express terms and the terms so implied, if conflict there be.

It is not my purpose here to argue the matter further, still less to endeavour to set up again any opinion of my own against a judgment of the Court of Appeal. I should not, indeed, have referred to my own view of the matter at all, but that its reversal in the Court of Appeal after its approval by Lord Parker seems to be the clearest indication I can get that I am right in saying that, notwithstanding the difficulty felt and expressed by Lord Parker in the passage I have cited, the doctrine of frustration of adventure does apply to a time charterparty.

(1) [1916] 2 A. C. 427.
(2) [1917] 1 K. B. 222.
(3) [1916] 1 K. B. 438.
(4) [1916] 2 A. C. 397.

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It remains to apply the law as I understand it to the present case, and so doing it seems clear that this adventure was frustrated, and that too whether one considers the position as at the date of the requisition or holds the matter in suspense until the termination of the charterparty, and I so answer the question submitted to me.

Alternative award upheld.

Solicitors for charterers: *W. A. Crump & Son.*
Solicitors for chartered owners: *Winn-Jones & Co.*

J. S. H.

Distinguished. SELLERS *v.* LONDON COUNTIES NEWSPAPERS [1951] 1 K. B. 784

MARSHALL *v.* GLANVILL AND ANOTHER.

1917
March 30.

Principal and Agent—Traveller—Right to Commission after Agency determined—Contract—Illegality—Suspension—Dissolution.

The defendants, a firm of drapers, appointed the plaintiff as their representative for the Midlands, North of England, and Scotland. He was to have "a commission of 7½ per cent. on the net amount of trade done on these grounds direct or indirect." All accounts opened by him on the above grounds were to be retained by him as long as he continued to represent the defendants, but "should any alteration be made in representation on part of these grounds" the plaintiff's consent in writing was to be obtained before relinquishing any particular accounts. The agreement was terminable by six months' notice on either side.

On July 12 the plaintiff joined the Royal Flying Corps. Four days later he would have been compelled to join the forces by virtue of the Military Service Acts:—

Held, that the agreement was subject to the implied term that it should cease to be binding if future performance became unlawful, and that, performance having become unlawful by virtue of the Military Service Acts on July 12 or four days later, the agreement was then finally determined and not merely suspended.

Tamplin Steamship Co. v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 and *Distington Hematite Iron Co.* v. *Possehl & Co.* [1916] 1 K. B. 811 followed.

Held, also, that the plaintiff was not entitled to commission upon trade done after the termination of his employment.

Bilbee v. *Hasse* (1889) 5 Times L. R. 677 and *Wilson* v. *Harper* [1908] 2 Ch. 370 distinguished.

APPEAL from the Lambeth County Court.

The plaintiff claimed damages for breaches of two contracts hereafter mentioned, dated respectively June 12, 1915, and January 3,

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1916. Alternatively he claimed a declaration that he was entitled to commission at the rates stated in the aforesaid contracts upon all trade done and to be done since July 1, 1916, between the defendants and customers introduced to them by him.

The defendants were drapers carrying on business under the name of Cameron Banks & Co.

The contract of June 12, 1915, was in these terms: "Messrs. Cameron Banks & Co. . . . . agree to appoint Mr. A. Marshall as their representative for the Midlands, North of England, and Scotland on the following terms, viz., a commission of 7½ per cent. on the net amount of trade done on these grounds direct or indirect, and it is agreed that Mr. Marshall shall draw on account of such commission his expenses as required up to 7*l.* per week for from four to six weeks each half year. Mr. Marshall's account shall be made to the end of each six months. All accounts opened by Mr. Marshall on the above grounds shall be retained by him for such time as he continues to represent Messrs. Cameron Banks, but should any alteration be made in representation on part of these grounds Mr. Marshall's consent to be obtained in writing before relinquishing any particular accounts. The season's notice to be given on either side for the termination of this agreement. This agreement to be distinct from the one held as regards the suburbs of London."

A season's notice was admitted to be a six months' notice.

The contract of January 3, 1916, was in these terms: "We agree to give you 1*l.* per week as travelling expenses and allow you to draw 2*l.* per week on account of commission when travelling in London and district, the same to commence on and after January 1, 1916. We agree also that the commission on your London ground shall be 5 per cent. on all net trade done and paid for, and that you do not have any commission on job goods. This agreement to cancel any previous arrangements made with you, and to be entirely separate from your country agreement. Yours faithfully, Cameron Banks & Co."

On the passing of the Military Service Act, 1916, the plaintiff became liable to military service. The defendants applied for his exemption, with the result that he was exempted from military service until July 16, 1916. He joined the Royal Flying Corps on July 12, 1916.

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The plaintiff alleged that by a letter dated October 13, 1916, the defendants purported to terminate his employment without giving him a season's notice, as required by the contract of June 12, 1915, and without giving him the customary season's notice under the agreement of January 3, 1916.

The defendants counterclaimed a declaration that the contracts of June 12, 1915, and January 3, 1916, were rescinded on the plaintiff's leaving their employment on July 12, 1916, and enlisting in the Royal Flying Corps.

The county court judge held that since July 12 or July 16, 1916, the plaintiff was at the disposal of the military authorities and therefore unable to continue in the service of the defendants as traveller; but he held that the contracts between the plaintiff and the defendants were not dissolved and that the plaintiff was entitled to commission under them already earned, and to commission on the trade done directly or indirectly within the areas travelled by the plaintiff under the contracts. He made a declaration that the contracts were still alive for the purpose of calculating the commission, and ordered an account of all commission earned by the plaintiff under the contracts from July 12, 1916, to January 12, 1917, and before July, 1916; and he dismissed the counter-claim.

The defendants appealed.

S. P. Kerr, for the appellants. By the terms of these contracts the respondent's right to commission ceased with the termination of his employment. This case is distinguishable from *Bilbee* v. *Hasse*. (1) Then did his employment end when he joined the forces? Plainly it did. He was no longer ready and willing to render any services. It became illegal—Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 17, sub-s. 1 (*c*)—and therefore impossible for the appellants to employ him. As the contracts were entered into on the basis that it should continue lawful to perform them, they were dissolved when performance became unlawful: *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2); *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3)

(1) 5 Times L. R. 677, affirmed in the Court of Appeal; see *The Times*, January 16, 1890.

(2) [1916] 2 A. C. 397.

(3) Ante, p. 1.

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Moyses, for the respondent. This case is within the principle of *Bilbee* v. *Hasse* (1) and *Wilson* v. *Harper*. (2) The commission would be payable even if the employment had come to an end. But the contracts are only suspended: *Nordman* v. *Rayner*. (3)

S. P. Kerr, in reply, referred to *Distington Hematite Iron Co.* v. *Possehl & Co.* (4)

ROWLATT J. This appeal must be allowed. The plaintiff was in the employment of the defendants. According to the finding of the county court judge he was called up for military service on July 12 or 16. Mr. Moyses contended that this did not terminate but only suspended the contracts of employment. I cannot agree with that contention. The effect of the Military Service Act, 1916, was to take the plaintiff out of the employment of the defendants. He could no longer execute their orders or go about their business and they could no longer employ him. For the present and for an indefinite period in the future he is out of their employment. The position is incapable of further statement.

Then, upon the construction of the contracts, is the plaintiff to receive any commission after his employment has ceased? The contract of June 12, 1915, provided that he should have a "commission of 7½ per cent. on the net amount of trade done on these grounds 'direct or indirect.'" That means that he is to have a commission on all business done in his district whether he introduced the business or not. Then there is another clause providing that "All accounts opened by Mr. Marshall shall be retained by him for such time as he continues to represent Messrs. Cameron Banks, but should any alteration be made in representation on part of these grounds Mr. Marshall's consent to be obtained in writing before relinquishing any particular accounts." That means that, although the plaintiff's right to commission while representing the defendants in a particular district extends to all trade coming from that district, nevertheless, should he cease to represent them in part of a district, he may keep the commission on accounts actually opened by him.

(1) 5 Times L. R. 677, affirmed in the Court of Appeal; see *The Times*, January 16, 1890.

(2) [1908] 2 Ch. 370.

(3) (1916) 33 Times L. R. 87.

(4) [1916] 1 K. B. 811.

It follows that the liability to pay commission does not survive the termination of the employment.

In *Bilbee* v. *Hasse* (1) the contract provided that the agent should receive a commission upon certain earmarked accounts, namely, upon all orders executed by his principals and paid for by the customers arising from his introduction. It was held that he was entitled to a commission on the orders so ascertained whether at the time when they were executed he was in the employment of the defendants or not. But where, as in the present case, the commission is payable not upon specified accounts, but upon all business coming from wide areas, there would practically be no way of terminating the liability to pay commission if the contention of the plaintiff were upheld. In my opinion that liability ceased with the termination of the plaintiff's employment. The appeal must be allowed and judgment entered for the defendants.

McCARDIE J. I am of the same opinion. The plaintiff was engaged under two contracts requiring the performance of personal services by him. The effect of his enlistment or of the Military Service Act, 1916, was to sweep away the basis of the arrangement between the parties. From the middle of July, 1916, the plaintiff could not fulfil any of his duties and the defendants could not accept any of his services under the contracts. The contracts therefore came to an end. The principle which is to guide us has been laid down by the House of Lords in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2), and the question is, Did the plaintiff and defendants make their bargain on the footing that a particular state of things should continue to exist? If so, a term to that effect is implied, and when that state of things ceases to exist the bargain itself ceases to exist. Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end. A state of war is assumed to be of such prolonged duration as prima facie to put an end to contracts which are conditional upon the continuance of a particular state of things which is only

(1) 5 Times L. R. 677. (2) [1916] 2 A. C. 397.

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consistent with peace. It was suggested that the contracts in this case were merely suspended. In my view the facts here wholly negative suspension, and on this point I need only refer to *Distington Hematite Iron Co.* v. *Possehl & Co.* (1) Inasmuch as reference has been made to *Nordman* v. *Rayner* (2), I may say that the ratio of my decision in that case that the internment did not dissolve the contract was that the internment was merely temporary, and that upon the special facts it was doubtful from first to last whether it would last for any substantial period. In the present case the plaintiff labours under a prolonged inability to perform any of his obligations under the contracts.

Then, assuming that these contracts were determined in July, 1916, did the plaintiff remain entitled to commission on trade done by the defendants after that date? As I pointed out in *Nordman* v. *Rayner* (2), *Bilbee* v. *Hasse* (3) did not decide any far-reaching principle; it turned on a particular form of words. The same remark applies to *Wilson* v. *Harper*. (4) To cases where the terms of the contract are not in substance identical with those in *Bilbee* v. *Hasse* (3) and *Wilson* v. *Harper* (4) neither of those decisions applies. Prima facie the liability to pay commission in cases of this kind ceases as to future trade with the cessation of the employment in the absence of a reasonably clear intention to the contrary. Accordingly in the present case the right to commission on future trade ceased in July, 1916, unless the words of the contracts show a reasonably clear intention to the contrary. These contracts differ substantially from those in *Bilbee* v. *Hasse* (3) and *Wilson* v. *Harper*. (4) The words in the first contract "All accounts opened by Mr. Marshall on the above grounds shall be retained by him for such time as he continues to represent Messrs. Cameron Banks" negative rather than support the contention that the plaintiff is entitled to commission in the events which have happened, and the words which follow reserving the plaintiff's right in certain circumstances point to the conclusion that but for the reservation his right would cease even in those circumstances. There is therefore no expression of an intention that he shall retain a right to commission on trade done by the defendants after his employ-

(1) [1916] 1 K. B. 811.
(2) 33 Times L. R. 87.
(3) 5 Times L. R. 677.
(4) [1908] 2 Ch. 370.

ment has ceased, but rather an indication to the contrary. The appeal must be allowed.

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Appeal allowed.
Leave to appeal. (1)

Solicitor for appellants : *J. Arnatt.*
Solicitor for respondent : *J. E. Gowing.*

W. H. G.

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[1916 H. 1755.]

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March 27 ;
April 2.

Chose in Action—Legal Assignment—Judgment for Costs—Costs taxed but Amount not entered—Present or future Debt—Assignment by Deed without Consideration.

A judgment for possession of land and costs had been recovered against the defendant. The costs had been duly taxed, but the amount thereof was not entered upon the record. While the record was in this form the judgment was assigned to the plaintiff by deed without consideration, and notice in writing of the assignment was duly given to the defendant. In an action by the plaintiff as assignee to recover the amount of the costs :—

Held, that the deed operated as a valid legal assignment of a present debt, and that the plaintiff was entitled to recover.

TRIAL of action before Atkin J. without a jury.

The plaintiff claimed a sum of 103*l.* 14*s.* 6*d.* as assignee of a judgment recovered against the defendant on February 17, 1916, by one James Fitzalan Hope in an action of *Hope* v. *Hambleton and Brown*, 1915, H. 2726, in the King's Bench Division of the High Court of Justice. It was an action of ejectment in which James Fitzalan Hope claimed to recover possession of Newnham Park Farm, Crowborough, in the county of Sussex, together with mesne profits. As against the present plaintiff, Hambleton, the action was compromised. The defendant Brown defended the action and filed a counter-claim. Judgment was given against him in the following terms (omitting formal parts) :—

" Dated and entered the 17th day of February, 1916.

" This action having on the 17th day of February, 1916, been

(1) See also *Faulkner* v. *Coop & Co.* (1899) 4 Com. Cas. 213 and *Barrett* v. *Gilmour & Co.* (1901) 6 Com. Cas. 72.

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tried before the Honourable Mr. Justice Rowlatt by an order of Master Archibald dated the 7th day of January, 1916, leave having been given to the plaintiff to sign final judgment against the defendant Hambleton for possession of the land mentioned in the writ,

" On the 17th day of February, 1916, the said Mr. Justice Rowlatt directed that judgment should be entered for the plaintiff against the defendant Charles Brown on the claim for possession of a farmhouse buildings and seventy-one acres three perches of land known as Newnham Park Farm in the parish of Buxted in the county of Sussex. And on the counter-claim with costs.

" Leave was given to enforce the judgment forthwith.

" An inquiry as to the mesne profits is referred to a Master.

" Therefore it is adjudged that the plaintiff recover against the defendant Charles Brown possession of a farmhouse buildings and seventy-one acres three perches of land known as Newnham Park Farm in the parish of Buxted in the county of Sussex and costs to be taxed. And it is further adjudged that the defendant Charles Brown recover nothing upon his counter-claim and that the plaintiff recover against the defendant Charles Brown his costs of the counter-claim to be taxed.

" And it is ordered that the plaintiff be at liberty to enforce this judgment forthwith. And that an inquiry as to mesne profits be referred to a Master.

" The above costs have been taxed and allowed at £ as appears by a taxing officer's certificate dated the day of 19 ."

On April 20, 1916, there was dated and filed a certificate for costs which (omitting formal parts) was as follows :—

" In pursuance of the judgment in the above action bearing date the 17th day of February, 1916, I have proceeded on the matters by the said judgment referred to me and notice of taxation having been duly given I certify that I have taxed the costs of the plaintiff down to and including the said judgment thereby directed to be taxed at the sum of one hundred and three pounds fourteen shillings and six pence."

On August 31, 1916, James Fitzalan Hope by a deed without consideration assigned as beneficial owner to the present plaintiff

" All that the said judgment and the benefit and advantage thereof so far as the same is still outstanding and unsatisfied as aforesaid together with the said sum of 103*l.* 14*s.* 6*d.* due and payable for costs under the said judgment and all other moneys (if any) due and recoverable under the said judgment to hold the same unto the said " plaintiff " absolutely."

On September 8, 1916, notice in writing of this assignment was duly given to the defendant by the solicitors of the plaintiff.

The plaintiff claimed 103*l.* 14*s.* 6*d.* as being the amount of the taxed costs.

Barrington-Ward (for *Rowand Harker*, serving with His Majesty's Forces), for the plaintiff.

F. O. Robinson, for the defendant. At the date of the assignment the mesne profits were not ascertained, and though the costs had been taxed the amount had not been entered in the record of the judgment. Execution could not have issued on that judgment at the instance of the assignor: *In re Crump* (1); and consequently not at the instance of the assignee. Until the mesne profits are assessed and the amount of the taxed costs is entered upon the record the assignment can only be valid as an assignment of a future debt. There can be no legal assignment of a future debt: *Tailby* v. *Official Receiver* (2); and an equitable assignment is void without consideration: *In re Ellenborough* (3); *Glegg* v. *Bromley*. (4)

Barrington-Ward in reply. The deed of August 31 operates as a legal assignment of the amount of the taxed costs. The amount was duly ascertained before the assignment. The only thing wanting is the merely ministerial act of inserting the figures in the record. The question here is not whether execution will issue on the judgment, but whether there is a judgment debt. If necessary the Court can and ought to order that the amount of the taxed costs shall nunc pro tunc be entered upon the record. The plaintiff, as the legal assignee of a legal debt presently payable, is entitled to recover.

Cur. adv. vult.

(1) (1891) 64 L. T. 799.
(2) (1888) 13 App. Cas. 523.
(3) [1903] 1 Ch. 697.
(4) [1912] 3 K. B. 474.

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April 2. ATKIN J. read the following judgment:—In this case the plaintiff sued on two separate causes of action: (1.) To recover 31*l.* 8*s.* 2*d.* money alleged to be had and received by the defendant for the use of the plaintiff as his agent and money found to be due on account stated; (2.) To recover 103*l.* 14*s.* 6*d.* said to be due by the defendant to the plaintiff as assignee of a judgment recovered in the High Court on February 17, 1916, in an action of *Hope* v. *Hambleton and Brown*, 1915 H. 2726, by one Hope against the defendant. The assignment is dated August 31, 1916. Written notice was given on September 8, 1916.

As to the first cause of action, it is admitted by the plaintiff that it fails, and that in fact on the account between the plaintiff and the defendant 29*l.* 14*s.* 6*d.* is due to the defendant, for which sum the defendant has counterclaimed.

As to the second cause of action, the facts appear to be that on February 17, 1916, after trial before a judge alone, Hope recovered judgment against the defendant Brown for possession of a certain tenement and costs to be taxed. Judgment was duly drawn up and entered on March 20, 1916. In accordance with Order XLI., r. 3, the entry was dated February 17, 1916, the day the judgment was pronounced. The costs were duly taxed at 103*l.* 14*s.* 6*d.*, as appears from the taxing Master's certificate dated April 20, 1916, which states: "In pursuance of the judgment in the above action bearing date February 17, 1916, I have proceeded on the matters by the said judgment referred to me and I certify that," &c.

In the judgment as entered there is the usual paragraph: "The above costs have been taxed and allowed at £ as appears by a taxing officer's certificate dated the day of 19 ." In the ordinary course of practice these blanks should have been filled up by the plaintiff's solicitor in the judgment entered in the office and verified by the proper officer. This has never been done, though the plaintiff's solicitor has filled in the blanks in the office copy of the judgment held by him and transferred to the assignee. The judgment further directed as follows: "An inquiry as to the mesne profits is referred to a Master." It did not purport to give judgment for mesne profits or for the amount to be ascertained on such inquiry. No inquiry has been held and the plaintiff intimated that he waived any such inquiry.

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Upon these facts Mr. Robinson, for the defendant, raised several objections: First, it was said that the judgment was for costs and mesne profits, and that the assignment was only of the judgment for costs. The assignment was therefore only of part of an entire chose in action and was invalid. It is unnecessary to consider whether, if the judgment included a sum for mesne profits, there could be said to be an assignment of part of one entire debt, or whether, if the assignment were for part of a debt, it would be invalid, for in my opinion the only debt created by this judgment as entered is for costs, and I think the objection fails.

Secondly, it was said that the judgment for costs was for a future debt, and that the assignment being of a future debt could not operate under the Judicature Act as a legal assignment, but could only be valid as an equitable assignment; and as an equitable assignment it was invalid, being made for a past consideration and therefore being voluntary: see *Wigan* v. *English and Scottish Law Life Assurance Association* (1); *Glegg* v. *Bromley*. (2) I think on a proper construction of the assignment, no evidence being tendered as to any other consideration than that indicated in the document, the assignment was not an assignment for value, the consideration being clearly past. The debt is said to be a future debt because, it is contended, there was no effective judgment for the costs until the amount of the Master's certificate was filled in in the judgment: see *In re Crump*. (3) The obligation to pay arose entirely from the judgment, and until that was effective there was only an expectancy of future property. It appears to me that the true view is that in a judgment for costs there is an actual judgment giving rights to the successful party as soon as pronounced. It is adjudged that the party recover costs to be taxed. The amount to be recovered has to be ascertained in a prescribed manner by taxation and, when the taxing Master has ascertained the amount and so certified, nothing further remains to be done but the ministerial act of completing the record. The case of *In re Crump* (3) arose upon a bankruptcy notice given in respect of a judgment for costs. It was ascertained by the Court that the practice was not to allow execution to issue until the amount of the certificate was entered on the

(1) [1909] 1 Ch. 291. (2) [1912] 3 K. B. 474.
(3) 64 L. T. 799.

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judgment. This had not been done, and the Court held the act of bankruptcy not established. The power to issue a valid bankruptcy notice under the Bankruptcy Act, 1883, depended upon the right to issue execution on the judgment; and this seems the ground of the decision. On the other hand, in *Holtby* v. *Hodgson* (1) the Court of Appeal held a garnishee order absolute dated July 31, 1889, was valid which had been obtained attaching a judgment debt recovered against the garnishee on July 23, 1889, though the judgment against the garnishee was not in fact entered until October, 1889, and the Court relied upon the provisions of Order XLI., r. 3, which provides that "where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced . . . . and the judgment shall take effect from that date." It appears to me that there was a valid chose in action in existence capable of legal assignment from the date of the judgment, and in any case from the date of the taxing Master's certificate. There seems to me no ground for suggesting that the plaintiff's right is only a right to future property such as must be the subject, if at all, of an equitable assignment.

Thirdly, the further point was made that in any case, whether validly assigned or not, the debt was not payable at the date of the writ because of the failure to enter. I think this is based upon a misapprehension. In an action on a judgment it appears necessary to prove the judgment by production of the record. The ordinary traverse of the existence of the judgment sued on is "nul tiel record." The point, however, is one not of liability but of evidence. I have already intimated that, in my opinion, when suing on a judgment for costs the record is sufficiently proved by production of the judgment as entered for costs to be taxed together with the taxing Master's certificate. But if this were not so the question appears to me to be purely a technical point as to proof, and I think it would be proper to direct, and I do direct as a preliminary to this judgment, that the amount of the Master's certificate be filled in in the judgment already entered in this Court. If I am right in treating the question as one of proof only, I see no reason to suppose that the record must exist in a complete form at the date of the issue of the writ.

The result is that the objections fail. There must be judgment for

(1) (1889) 24 Q. B. D. 103.

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the plaintiff for 103*l.* 14*s.* 6*d.* with costs on the claim, and judgment for the defendant for 29*l.* 14*s.* 6*d.* on the counter-claim with costs. The defendant must also have his costs of defending the claim for 31*l.* 8*s.* 2*d.* There will be a set off of amounts recovered and of costs.

Judgment accordingly.

Solicitors for plaintiff: *Lee, Ockerby & Everington, for H. J. Allen Hardwicke, Crowborough.*

Solicitor for defendant: *George Bodman.*

W. H. G.

[IN THE COURT OF APPEAL.]

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March 30; *April* 2.

THE KING *v.* GARRETT.

Ex parte SHARF AND OTHERS.

Practice—Appeal—"Criminal cause or matter"—Charge under Defence of the Realm (Consolidation) Regulations, 1914, *reg.* 45 (*b*)—*Prohibition—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

The appellants were on board a Danish ship which sailed from Christiania for New York. The ship was, under an agreement with the Danish Government, brought into Kirkwall Harbour for the purposes of search, and while there the appellants were removed from the ship by the British authorities and charged at Bow Street Police Court under reg. 45 (*b*) of the Defence of the Realm (Consolidation) Regulations, 1914, with having knowingly made false statements to the Russian Consul at the Russian Consulate in London with intent to obtain passports to proceed to Russia. The appellants applied for a writ of prohibition to prohibit the magistrate from further hearing and determining the charge on the ground that he had no jurisdiction in the matter. The King's Bench Division having dismissed the application:—

Held, that the order of the King's Bench Division was a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, and that no appeal lay to the Court of Appeal.

APPEAL from an order of a Divisional Court (Viscount Reading C.J. Ridley and Lord Coleridge JJ.) discharging a rule nisi for a writ of prohibition.

The rule was directed to "Edmund William Garrett, Esq., one of the magistrates of the police courts of the metropolis sitting at

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the Bow Street Police Court, to show cause why a writ of prohibition should not be awarded to prohibit him from further proceeding to hear and determine a certain charge against Chaim Sharf" and three others (the applicants for the rule) "under regulation 45 (*b*) of the Regulations made under the Defence of the Realm Acts for all knowingly making false statements to the Russian Consul at the Russian Consulate, 30, Bedford Square, in the county of London, with intent to obtain passports to proceed to Russia, on the ground that the said accused persons, not being British subjects nor enemies of His Majesty and being forcibly removed from a neutral ship and brought against their will into the realm, are not properly triable by him, and that he is without jurisdiction in the premises."

In November, 1916, the applicants, who were Russian subjects and had been in this country, sailed on board a Danish ship from Christiania for New York, and the ship was, under an agreement with the Danish Government, taken into Kirkwall Harbour for the purpose of search, and the applicants were removed by the British authorities from the ship and charged, under reg. 45 (*b*) of the Defence of the Realm (Consolidation) Regulations, 1914, with the above offence, which under reg. 58 is punishable by imprisonment or fine. The Divisional Court held that the ship was properly in the port, and that the applicants could properly be arrested and charged with the offence. The rule was accordingly discharged.

The applicants appealed.

March 30. *Sir Frederick Smith, A.-G.*, and *Ricketts*, for the respondent. This is an appeal in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and no appeal lies from the judgment of the King's Bench Division. By s. 100 "cause" includes "any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown; and "matter" includes "every proceeding in the Court not in a cause." The charge before the magistrate was for an offence under reg. 45 (*b*) of the Defence of the Realm (Consolidation) Regulations, 1914, which by reg. 58 is punishable by fine or imprisonment. That was a criminal charge. The alleged offence was committed in this country and the trial takes place here. The words "criminal cause or matter" should receive the widest

possible interpretation: *Ex parte Woodhall.* (1) [*Ex parte Schofield* (2) was also referred to.]

Healy, K.C., and *Holford Knight*, for the appellants. The question in the present case is not a question of English criminal law, but of international law. The question is whether there was any jurisdiction to forcibly remove the appellants from a neutral ship, which had come into the harbour of Kirkwall under an Order in Council of March, 1915, for the purpose of search for contraband cargo, and to charge them before a magistrate with an offence alleged to have been committed in this country. There is therefore an antecedent question of international law before any question of a criminal charge can arise. The ship was brought into Kirkwall for the sole purpose of searching for contraband cargo, and for no other purpose, and the effect was the same as if the appellants had been taken out of the ship on the high seas. "It would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search—a practice which is justifiable because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea": *The Zamora.* (3) It is admitted that the judgment of the Court on an application for a certiorari after conviction would be a judgment in a criminal cause or matter: *Reg.* v. *Fletcher* (4); but this is not an application for a certiorari or habeas corpus. It is a question of international law which arises before any question of criminal law emerges. Before the question of the commission of an offence arises the Court has power to inquire whether there has been an assertion of sovereignty over the person, which is not recognized as being warranted by international law. That question does not arise "in any criminal cause or matter" within s. 47 of the Judicature Act, 1873. [*Reg.* v. *Keyn* (5), *Scott* v. *Scott* (6), and reg. 56 of the Defence of the Realm (Consolidation) Regulations, 1914, were also referred to.]

Sir Frederick Smith, A.-G., in reply. The test of jurisdiction under s. 47 is, as Lord Loreburn said in *Scott* v. *Scott* (7), "not

(1) (1888) 20 Q. B. D. 832. 835.
(2) [1891] 2 Q. B. 428.
(3) [1916] 2 A. C. 77, 108.
(4) (1876) 2 Q. B. D. 43.
(5) (1876) 2 Ex. D. 63, 68.
(6) [1913] A. C. 417.
(7) Ibid. 444.

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whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter." Under that test the application for a prohibition is made in a criminal cause or matter.

SWINFEN EADY L.J. We are all of opinion that the preliminary objection must prevail, but as the matter is of general importance we will state our reasons in writing.

Cur. adv. vult.

April 2. SWINFEN EADY L.J. read the following judgment :— This is an appeal by Chaim Sharf and others, Russian subjects, from an order of the King's Bench Division discharging a rule for a prohibition.

The rule was obtained by the appellants for Mr. Garrett, a magistrate at Bow Street Police Court, to show cause why a writ of prohibition should not be awarded to prohibit him from further proceeding to hear and determine a certain charge against the appellants under reg. 45 (*b*) of the Regulations made under the Defence of the Realm Acts for all knowingly making false statements to the Russian Consul at the Russian Consulate, 30, Bedford Square, in the county of London, with intent to obtain passports to proceed to Russia, on the ground that the said accused persons, not being British subjects nor enemies of His Majesty and being forcibly removed from a neutral ship and brought against their will into the realm, are not properly triable by him, and that he is without jurisdiction in the premises.

The King's Bench Division, after full argument, dealt with the case on the merits, and held that on the facts the vessel was properly within port, and that the men were then arrested, as they could properly be arrested, and charged with the offence ; and the Court discharged the rule. The accused now appeal from that order, and objection is taken that this is a criminal matter and that no appeal lies.

It is provided by the Judicature Act, 1873, s. 47, that " no appeal shall lie from any judgment of the High Court in any criminal cause or matter," with an exception not material for the present purpose.

It is settled that the word "judgment" is used here in a broad sense, and extends to all orders of the High Court in criminal cases, even where the original criminal proceedings were not in the High Court: *Reg.* v. *Fletcher.* (1) The appellants are charged with a criminal offence, and their objection was, and is, that the police magistrate has not any jurisdiction to try them.

It is conceded that if they had been tried and convicted, and a rule for a certiorari to quash the conviction on the ground of want of jurisdiction had been obtained and discharged, no appeal would lie, as the order discharging the rule would have been a judgment of the High Court in a criminal matter. This was determined in *Reg.* v. *Fletcher.* (1) In that case Lord Esher (then Sir Baliol Brett J.A.) said (2): "There has been a conviction in a criminal matter by justices, and a motion in the Queen's Bench Division for a certiorari for the purpose of determining whether that conviction is good or ought to be quashed; and the Queen's Bench has determined, by discharging the rule for a certiorari, that the conviction ought to stand; in other words, the Court has affirmed the conviction. If that is not a proceeding in a criminal matter, I am at a loss to see what is." If the question of want of jurisdiction in a criminal matter cannot be brought by way of appeal after conviction and the discharge of a rule for a certiorari, it is difficult to see on what principle there should be an appeal if the same question of jurisdiction is raised before conviction upon a rule for a prohibition. In each case the question is the same, namely, whether the criminal Court had jurisdiction to entertain the particular criminal proceeding against certain named persons.

In *Ex parte Woodhall* (3) it was held that there was no appeal from the refusal by the Queen's Bench Division of a writ of habeas corpus made on behalf of a person who had been committed to prison under the Extradition Act, 1870, as a fugitive criminal accused of an extradition crime. It was urged in that case that an application for a writ of habeas corpus was not a criminal cause or matter within the meaning of s. 47, but a collateral matter, not necessarily having reference to any criminal proceeding. It was, however, decided that if the subject-matter of the proceedings in respect of

(1) 2 Q. B. D. 43. (2) Ibid. 46.
(3) 20 Q. B. D. 832.

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Swinfen Eady L.J.

which the application was made was criminal the Court would have no jurisdiction to hear the appeal. In that case Lord Esher M.R. said (1): "I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. Applying that proposition here, Was the decision of the Queen's Bench Division, refusing the application for a writ of habeas corpus, a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham? I am clearly of opinion that it was, and I think it is impossible to say that what took place before him was not a proceeding the subject-matter of which was criminal. If the proceeding before the magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of habeas corpus, which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal. It follows, therefore, that this Court has no jurisdiction to hear the appeal." In *Ex parte Schofield* (2) an order had been made by a magistrate under s. 96 of the Public Health Act, 1875, for the abatement of a nuisance, and he refused to state a case. This decision was a proceeding in a criminal cause or matter. An application was then made to the Queen's Bench Division for an order nisi for a mandamus to compel the magistrate to state a case in order to have it determined whether his decision was right or wrong. The Queen's Bench Division refused an application for a rule nisi, and it was held by the Court of Appeal that, such decision having been given in a criminal cause or matter within the meaning of s. 47, the Court of Appeal had no jurisdiction to entertain an appeal from such refusal.

Reg. v. *Tyler* (3) was the converse of the present case. It was not an application for a prohibition to restrain a magistrate from proceeding, but an application for a mandamus to compel him to proceed to hear an application for the issue of a summons. The Queen's Bench Division discharged a rule nisi for a mandamus directing him to hear and determine the application, and it was

(1) 20 Q. B. D. 836. (2) [1891] 2 Q. B. 428.
(3) [1891] 2 Q. B. 588.

held that no appeal would lie from the order of the High Court, as the application to the magistrate for a summons was a criminal proceeding.

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I am of opinion that no distinction in principle can be drawn between the cases to which I have referred and the present. The judgment of the Divisional Court in this case discharging the rule for a prohibition was a judgment in a criminal cause or matter, namely, the criminal proceedings pending in the police court, and this Court is unable to entertain any appeal from that judgment.

The appeal should be dismissed.

BANKES L.J. read the following judgment:—On January 26 last the Divisional Court granted a rule nisi calling upon Mr. Garrett, one of the metropolitan police magistrates sitting at Bow Street, to show cause why a writ of prohibition should not be awarded to prohibit him from further proceeding to hear and determine a certain charge against the present appellants under reg. 45 (*b*) of the Regulations made under the Defence of the Realm Acts for knowingly making false statements to the Russian Consul at the Russian Consulate in London with intent to obtain passports to proceed to Russia. The offence referred to in the rule is a criminal offence which under reg. 58 of the Regulations made under the Defence of the Realm Acts is punishable by fine or imprisonment. Cause was shown against the rule on February 1 last and an order was made discharging it. The present is an appeal against that order.

The Attorney-General took a preliminary objection that the order of the Divisional Court was a "judgment in a criminal cause or matter" coming within s. 47 of the Judicature Act, 1873, and that consequently no appeal lay. The question of what matters come within the scope of this section has been before this Court on many occasions. There is a manifest distinction between a case in which the correctness of some decision given in a criminal cause or matter is in question and a case where the question is whether some particular tribunal has any jurisdiction at all in reference to some criminal cause or matter upon which it is asked to adjudicate. I have looked into the cases, and I cannot find that this distinction has ever received any recognition in this Court. On the contrary

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Bankes L.J.

I find a number of cases which proceed upon the assumption that, though the distinction may exist, both classes of cases fall within the section. Mr. Healy has contended that some distinction should be drawn between such cases as *Reg.* v. *Fletcher* (1), where the jurisdiction of the inferior Court was challenged by an application for a certiorari to quash the proceedings after the Court had taken action, and the present case, where the jurisdiction was challenged by an application for a prohibition before the Court took any step in the proceedings. I cannot see any ground upon which this distinction can rest. This Court has on more than one occasion expressed the view that the language of s. 47 of the Judicature Act, 1873, is to be interpreted in its widest sense: see *Ex parte Woodhall* (2); *Rex* v. *Wiltshire Justices.* (3) In *Rex* v. *Governor of Brixton Prison* (4) Fletcher Moulton L.J. says this: "If any portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it, and in such a case this Court is not competent to entertain an appeal." Having regard to the decisions of this Court to which I have referred, and to many others to which reference might be made, I am of opinion that the point taken by the Attorney-General is concluded by authority and that this appeal fails.

Mr. Healy made some reference to the rules of international comity, and to some suggested breach of those rules by the action of the authorities in arresting his clients on board a Danish merchant vessel which, in accordance with the provisions of the Order in Council of March, 1915, had come into the harbour of Kirkwall for the purposes of search. It is unnecessary to express any opinion upon this contention, because it can have no effect (even if it was sound) upon the construction which this Court ought to put upon s. 47 of the Act of 1873; nor can it operate to confer powers upon this Court which the statute expressly says it is not to have.

BRAY J. read the following judgment:—On the preliminary objection to the hearing of this appeal the only point we have to decide is whether the judgment of the High Court from which this

(1) 2 Q. B. D. 43.
(2) 20 Q. B. D. 832.
(3) [1912] 1 K. B. 566.
(4) [1910] 2 K. B. 1056, 1065.

appeal is brought is a judgment in a criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873. The judgment of the High Court was an order that a rule nisi obtained by the appellants should be discharged. The rule nisi was in the terms which have been already mentioned. The appellants therefore asked the High Court to prohibit the proceedings before a magistrate on the ground that he had no jurisdiction. The proceedings were criminal proceedings against the appellants for having knowingly made false statements at the Russian Consulate with intent to obtain passports to proceed to Russia. In my opinion this case is completely covered by authority. In *Ex parte Woodhall* (1) Lord Esher, after stating that the Court ought not any longer to flinch from determining whether it had jurisdiction to hear the appeal or not, said: "The result of all the decided cases is to show that the words 'criminal cause or matter' in s. 47 should receive the widest possible interpretation"; and (2): "I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. . . . If the proceeding before the magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of habeas corpus, which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal. It follows, therefore, that this Court has no jurisdiction to hear the appeal." Applying the law there laid down to this case, the proceeding before Mr. Garrett was a proceeding the subject-matter of which was criminal. The prohibition, if issued, would enable the applicants to escape from the consequences of those proceedings. I can see no distinction between an application for a writ of habeas corpus and a writ of prohibition for want of jurisdiction. Lindley L.J. and Bowen L.J. gave judgments to the same effect. In *Rex* v. *Governor of Brixton Prison* (3) Fletcher Moulton L.J. expressly approved of the language used by Lord Esher in *Ex parte Woodhall*. (2) In *Ex parte Schofield* (4) the

(1) 20 Q. B. D. 835.
(2) Ibid. 836.
(3) [1910] 2 K. B. 1065.
(4) [1891] 2 Q. B. 428.

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Bray J.

Queen's Bench Division had refused to grant an order nisi for a mandamus to compel the magistrate, who had made an order for the abatement of a nuisance, to state a case. The Court of Appeal held that they had no jurisdiction to entertain the application for a mandamus, and Lord Esher said that he must stand by the decision of the Court in *Ex parte Woodhall.* (1) I think the law as laid down in *Ex parte Woodhall* (1), with which I entirely agree, governs this case, and we must hold that we have no jurisdiction to hear this appeal.

Appeal dismissed.

Solicitors for appellants: *Ellis & Co.*

Solicitor for respondent: *Treasury Solicitor.*

W. F. B.

1917

April 2.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* ROBINSON.

Criminal Law—Practice—Court of Criminal Appeal—Power to receive Evidence of Acts done by Prisoner after Conviction—Letter containing Confession—Privilege—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 9—*Rules of the Supreme Court, Order* LVIII., *r.* 4.

By s. 9 of the Criminal Appeal Act, 1907, "the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice . . . . exercise in relation to the proceedings of the Court any . . . . powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters."

By the Rules of the Supreme Court, 1883, Order LVIII., r. 4, "The Court of Appeal shall have . . . . full discretionary power to receive further evidence upon questions of fact . . . . in any case as to matters which have occurred after the date of the decision from which the appeal is brought."

After his conviction for murder the prisoner wrote from the prison in which he was confined a letter which had a most material bearing on the case. The letter had been destroyed by the person to whom it was addressed. The prosecution gave notice to the prisoner that, upon the hearing of an application which he intended to make to the Court of Criminal Appeal for leave to appeal, an application would be made by the prosecution for leave to call

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(1) 20 Q. B. D. 832.

witnesses for the purpose of proving the destruction of the letter and producing a copy in evidence :—

Held, that the evidence was admissible, and that no privilege attached to the letter.

APPLICATION by the prisoner for leave to appeal against his conviction for murder. In accordance with the usual practice in murder cases the application was dealt with as a final appeal.

The prisoner was convicted on March 6, 1917, at the Central Criminal Court. After his conviction, namely, on March 9, 1917, he wrote in Brixton Prison, where he was confined, a letter which had, counsel for the prisoner did not dispute at the hearing of the application, a most material bearing on the case. The letter had been destroyed by the woman to whom it was addressed, but the prison authorities, in accordance with the usual practice, had before posting the letter to her caused a copy of it to be made. On March 29, 1917, the prosecution gave notice to the prisoner that application would be made to the Court of Criminal Appeal, upon the hearing of the application by him for leave to appeal, for leave to call witnesses for the purpose of proving the destruction of the letter and producing the copy in evidence.

By s. 9 of the Criminal Appeal Act, 1907, "For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice,—(*a*) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and (*b*) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial . . . . ; and (*c*) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness . . . . ; and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters . . . . "

By the Rules of the Supreme Court, 1883, Order LVIII., r. 4, "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full

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discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court . . . . such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. . . . ."

R. D. Muir, in support of the application for leave to call the further evidence. Sect. 9 of the Criminal Appeal Act, 1907, coupled with Order LVIII., r. 4, shows that this Court has power to admit the evidence.

Arthur Bryan, for the prisoner. Evidence of acts done or statements made by the prisoner since his conviction is inadmissible. Sect. 9, sub-s. (*b*), only gives power to the Court to receive the evidence of witnesses who would have been compellable witnesses at the trial. That power cannot apply to the witnesses proposed to be called; for the letter did not come into existence till after the date of the trial. Sub-s. (*c*) of s. 9 must be read in conjunction with sub-s. (*b*). To admit this evidence would be tantamount to granting a new trial.

VISCOUNT READING C.J. The Court is of opinion that it has power under s. 9 of the Criminal Appeal Act, 1907, to admit this evidence. The words on which the prosecution rely are those which give to this Court the same powers as those possessed by the Court of Appeal in civil matters. It is quite clear that the Court of Appeal would, in civil matters, have the power to admit fresh evidence which the Court thought might throw material light upon the matter before it. The jurisdiction must always be exercised with great care, but, as it is admitted that the evidence will throw light upon the present case, we have come to the conclusion that it ought to be admitted. The

value to be attached to it will appear when we have the evidence before us.

Evidence was then given that the letter had been destroyed and that the copy proposed to be put in by the prosecution was a true copy of the original.

R. D. Muir submitted that the copy could be read.

Arthur Bryan. The letter having been written after conviction is privileged.

VISCOUNT READING C.J. The Court is of opinion that no privilege attaches to the letter, and that evidence of its contents is admissible.

The copy of the letter was then read. It contained the following passages :—" I tell you now that I am guilty of the crime, and am quite satisfied with my sentence. . . . . I myself look for sympathy from no one, for I do not deserve it. But I do want to impress upon you and everybody else that it was not done for robbery, but simply and unfortunately I took him for somebody else I had a row with on the previous day. And it was done with no intention to kill."

The prisoner was then called, and gave evidence to the effect that he mistook the deceased for a person with whom he had had a quarrel, and that he had no recollection of having written the letter, although he did not deny that he signed it.

The COURT (Viscount Reading C.J., Avory and Rowlatt JJ.) dismissed the appeal.

Solicitor for prosecution : *Director of Public Prosecutions.*
Solicitor for prisoner : *Registrar of Court of Criminal Appeal.*

J. E. A.

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March 5, 6; *April* 4.

H. NEWSUM & CO., LIMITED *v.* BRADLEY AND OTHERS.

[1916 H. 2010.]

Ship—Abandonment at Sea—Ship and Cargo subsequently salved—Right of Shipowner to Freight.

The defendants' ship while on a voyage from Archangel to Hull with a wood cargo was attacked by an enemy submarine. The master and crew were compelled by the enemy to leave the ship in the boats. The enemy attempted, but failed, to sink the ship, and she was subsequently found in a derelict condition by a British patrol boat and brought with her cargo to the Scottish coast, and was there taken possession of by the receiver of wrecks. The plaintiffs, who were the indorsees of the bills of lading, claimed delivery of the cargo to them free of freight on the ground that the defendants had abandoned the prosecution of the voyage :—

Held, that the master and crew had abandoned the ship in such circumstances as to indicate an intention not to perform the contract of affreightment, and that the plaintiffs were, therefore, entitled to receive the cargo free of freight.

The Cito (1881) 7 P. D. 5 and *The Arno* (1895) 72 L. T. 621 followed.

ACTION in the commercial list tried by Sankey J. without a jury.

The plaintiffs were the indorsees of bills of lading for the carriage of a wood cargo in the defendants' steamship *Jupiter* from Archangel for delivery at Hull. The plaintiffs alleged that the defendants had abandoned the prosecution of the voyage, and they claimed a declaration that they were, therefore, entitled to take delivery of the cargo free of freight. The defendants counterclaimed for the freight. The bills of lading contained the usual exceptions, including King's enemies and restraints of princes.

The facts as stated by the learned judge in his written judgment were as follows :—" The plaintiffs are the indorsees of bills of lading dated Archangel, September, 1916, and signed on behalf of the defendants, the owners of the *Jupiter*, for the carriage of a cargo of wood goods therein specified to be delivered in good order and condition at Hull on payment of freight as per charterparty dated July 18, 1916. The *Jupiter* duly proceeded on her voyage, but while off the coast of Scotland she was attacked by a German submarine upon October 7. The enemy compelled the crew to take

to their boats under threats from loaded revolvers. They then placed bombs on board the vessel, exploded them, and proceeded to tow the crew towards land, but cast them off after going a certain distance. The last the crew saw of the vessel led them to believe that she was sinking. They were picked up by a trawler and taken into Aberdeen, where the captain telegraphed to the owners on October 8: 'Ship sunk yesterday; submarine; arrived all well; sailors' home.'

"Owing to the fact, however, that the cargo was of wood the efforts to sink the ship were unavailing. She was found a water-logged derelict and towed by patrols of His Majesty's Navy with great difficulty into Newhaven, near Leith; but her condition was such that it was found necessary to beach her, and she was taken possession of on October 11 by the receiver of wrecks, to whom the salvors handed her over. At 3.30 in the same afternoon the plaintiffs' solicitors telegraphed to the receiver to the following effect:—'Receiver of wreck, Leith. Steamer *Jupiter*. We represent owners (of) cargo: understand she is now lying at Newhaven. Please note our clients' claim. Elect take possession their property where steamer now is. Please do not allow cargo to be dealt with except with our sanction. Please do anything necessary protect property for our clients.' The owners of the vessel at Hull heard the same day that she had been saved, and they received a telegram from the plaintiffs' solicitors about 2.45 in the afternoon saying: '*Jupiter*. We represent owners (of) cargo of this steamer recently brought into Leith derelict. Our clients elect take possession their property where now lying. Please note.' One of the owners of the vessel left for Leith that evening, and went down to the beach at Newhaven as soon as he reached that place, but could not get aboard. The following morning he saw the senior naval officer, told him he had come for the ship, and said: 'I am glad to have her back.' The officer replied: 'You have not got her back; she belongs to the receiver of wreck.' The owner was sent on board in a torpedo-boat, and left behind an engineer to represent him. By arrangement between the parties the vessel eventually proceeded to Hull and delivered her cargo, but this was done without prejudice to their rights on October 12, and it falls to me to decide what those rights were."

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Roche, K.C., and *R. A. Wright*, for the plaintiffs. The defendants having abandoned the ship the contract of affreightment was at an end, and the plaintiffs are therefore entitled to have the cargo delivered to them free of freight: *The Kathleen* (1); *The Cito* (2); *The Arno* (3); *Guthrie* v. *North China Insurance Co.* (4)

MacKinnon, K.C., and *Lewis Noad*, for the defendants. The authorities do not lay down as a matter of law that the act of the master and crew in leaving the ship must always and necessarily be treated as equivalent to a repudiation by the shipowner of the contract of carriage. The question in each case is whether the abandonment of the ship took place in such circumstances as to warrant the legal inference that the shipowner did not intend to perform his obligations under the contract of carriage. That inference cannot be drawn from the facts of this case. There was no abandonment of the ship within the meaning of the principle laid down in *The Cito* (2) and *The Arno*. (3) The master and crew did not leave the ship voluntarily, but were forcibly driven out of her. In any case an intimation by one party to a contract that he is not going to perform his part only amounts to a discharge of the contract by breach if the other party accepts the repudiation as an act determining the contract, and until it is accepted the repudiation may always be withdrawn: *The Arno* (3), per Bruce J. The defendants at the earliest possible moment declared their intention of performing the contract. It was in fact performed, for the cargo was carried to Hull, the port of discharge, and the defendants are therefore entitled to be paid freight.

R. A. Wright in reply. It is not necessary for the plaintiffs to show that there has been a repudiation of the contract by the defendants and an acceptance of that repudiation by the plaintiffs. There was no repudiation of the contract by the defendants, for the abandonment of the ship was not in the circumstances a breach of contract. But the question is, have the defendants earned the freight? The answer is, they have not done so. They could only earn it by performing their contract, but the act of the master and crew in leaving the ship in mid-ocean in the belief that she was about to sink not only made it impossible for the defendants to

(1) (1874) L. R. 4 A. & E. 269.
(2) 7 P. D. 5.
(3) 72 L. T. 621.
(4) (1902) 7 Com. Cas. 130.

perform their contract, but clearly indicated that the defendants were not going to try to perform it.

Cur. adv. vult.

April 4. SANKEY J. read the following judgment :—In this case the plaintiffs claim that they are entitled to take delivery of a cargo in the steamship *Jupiter* free of freight. The defendants deny that the plaintiffs are so entitled, and counterclaim for the freight a sum of 18,000*l.*

The facts are as follows : [The learned judge stated the facts as set out above, and continued :]

A number of cases were cited to me, including *The Cito* (1) and *The Arno.* (2) The law as laid down in those cases is that the abandonment of a vessel by its crew during a voyage, without any intention to retake possession, gives the owner of the cargo on board the right to treat the contract of affreightment as at an end. It may happen that after abandonment of a vessel its owner resumes possession before the cargo owner exercises his right to treat the contract as at an end, and the legal effect of such a resumption has never yet been decided. The point, however, does not arise in this case, for I find as a fact that, if the circumstances here show an abandonment of the vessel, the cargo owners exercised their right to put an end to the contract before the owners resumed their possession. The point for decision is whether there was an abandonment under the circumstances. In my view that is a question of fact. The learned counsel who appeared on behalf of the defendants contended that an abandonment of the vessel was not necessarily a repudiation of the contract of affreightment, and that the defendants must have been guilty of conduct from which it might be inferred that they intended to repudiate the contract.

In the present case the master and crew abandoned the vessel under stress of enemy violence, but I do not think that this is different from a master and crew abandoning the vessel under stress of the violence of the weather, as was the case in *The Cito.* (3) The vessel was left as a derelict upon the face of the waters. She was water-logged, and when the crew last saw her was believed to be

(1) 7 P. D. 5. (2) 72 L. T. 621.

(3) 7 P. D. 5, 9.

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sinking; in fact the first act of the master on landing was to telegraph that she had sunk. There is no suggestion that the abandonment was wrongful, an event which might not put an end to the contract of affreightment, as suggested by Brett L.J. in *The Cito.* (1) In my view there was in fact an abandonment of the vessel, and there was, on the part of the servants of the owners, an act done clearly indicating their intention not to carry out the contract; in other words, there was the predicament mentioned by A. L. Smith L.J. in *The Arno* (2) of a ship left derelict in mid-ocean and abandoned by its master and crew.

In the result I find that the defendants did not complete their contract, but abandoned the further performance of it before the vessel reached Newhaven. A similar case came before Bargrave Deane J. in 1915 in respect of a vessel which had been torpedoed off the south-west coast of England (*The W. S. Caine* v. *Bellglade* (3)), where the Court of Appeal upheld Bargrave Deane J. in the conclusion he came to, that the vessel had been abandoned.

My judgment, therefore, is for the plaintiffs for the relief claimed. Should this case be taken to the Court of Appeal and my judgment be reversed, I find that the amount due to the defendants on their counter-claim is 14,050*l.* 2*s.* 9*d.*

Judgment for the plaintiffs.

Solicitors for plaintiffs: *William A. Crump & Son.*

Solicitors for defendants: *Downing, Handcock, Middleton & Lewis.*

(1) 7 P. D. 5, 9.
(2) 72 L. T. 624.
(3) Reported in Lloyd's List, August 3, 1915.

F. O. R.

JONES, APPELLANT *v.* LEWIS, RESPONDENT. 1917 *April* 18.

Mine—Coal Mine—Offence—Person having Lucifer Match in Mine—Whether Search Condition Precedent to Prosecution—Coal Mines Act, 1911 (1 *& 2 Geo.* 5, *c.* 50), *ss.* 35, 75, 101, 103.

Sect. 35, sub-s. 1, of the Coal Mines Act, 1911, is an absolute prohibition against a person having in his possession, in a mine where safety lamps are required to be used, any lucifer match or any of the other articles mentioned. A person, therefore, who infringes this provision is guilty of an offence under the Act, and in proceedings in respect thereof it is not necessary to show that the accused had been searched under sub-s. 2 before he commenced work or that he had been searched by the person duly appointed to make searches.

CASE stated by the stipendiary magistrate for the Miskin Higher Division and two justices for Glamorganshire.

An information was preferred by the appellant against the respondent on August 30, 1916, for having on June 13, 1916, committed a breach of s. 35 of the Coal Mines Act, 1911 (1), in that he had a lucifer match in his possession in the Tower Colliery, Hirwain.

(1) Coal Mines Act, 1911, s. 35, sub-s. 1: "In any mine or part of a mine in which safety lamps are required . . . . to be used, no person shall have in his possession any lucifer match nor any apparatus of any kind for producing a light or spark . . . . or any cigar, cigarette, pipe, or contrivance for smoking."

Sub-s. 2: "The manager of a mine in which . . . . safety lamps are required . . . . to be used, shall, for the purpose of ascertaining before the persons employed below ground in the mine . . . . commence work whether they have in their possession any lucifer match or such apparatus as aforesaid or cigar, cigarette, pipe, or contrivance for smoking, cause either all those persons, or such of them as may be selected on a system approved by the inspector of the division, to be searched in the prescribed manner after or immediately before entering the mine . . . ."

By an Order of the Secretary of State dated May 21, 1912, it is provided that the search under this sub-section shall be made by a person or persons appointed for the purpose in writing by the manager.

Sub-s. 3: "No person shall search any workmen in pursuance of this section, unless he has previously given an opportunity to some two workmen employed in the mine to search himself, and no lucifer match, or other apparatus as aforesaid, and no cigar, cigarette, pipe, or contrivance

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The following facts were proved or admitted :—The appellant was the manager of the said colliery ; the respondent was a haulier employed thereat, and on June 13, 1916, he was working on the day shift which commenced at 7 A.M. On that day, some time after 9 A.M., the appellant, in company with the under manager and two workmen, commenced searching men employed below ground in the mine. About 10 A.M. the appellant met the respondent bringing out a full tram of coal, and searched his waistcoat and trousers, but found therein no lucifer match, cigar, pipe, or any contrivance for smoking. The appellant then asked the respondent where his coat was, to which the respondent replied that it was at the top of No. 3 dip, and he pointed it out hanging on a post about ten yards away. Thereupon the appellant proceeded to search the coat and found a match in the right-hand pocket thereof. Eight other hauliers had frequently passed the top of No. 3 dip between 7 A.M. and 10 A.M., during which time the respondent had been going backwards and forwards with trams. The appellant himself had been searched by two workmen before meeting the respondent. On the same date the respondent searched himself before going below ground and left his pipe at the locking station. He had found no match on his person when he left the said station. After going in he took off his coat and hung it up on dip No. 3. At the colliery 10 per cent. of the workmen were searched every morning by the under manager or the fireman. The appellant searched occasionally. The person appointed in writing to make such searches at the colliery was the fireman.

For the respondent it was contended that the search was unauthorized, inasmuch as the respondent was not searched before he commenced work and the appellant was not the proper person to search.

For the appellant it was contended that he as manager of the mine had the right to search.

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for smoking, has been found on him."

Sub-s. 4: "Any person who refuses to allow himself to be searched in accordance with the foregoing provision shall be guilty of an offence against this Act, and shall not be allowed to enter the mine, ... and any person who on being searched is found to have in his possession any of the articles prohibited under this section, shall be guilty of an offence against this Act."

The stipendiary and the justices found as a fact that the match was discovered by the appellant in the respondent's coat pocket at or about 10 A.M. on June 13. The stipendiary held as a matter of law that the appellant had not complied with the provisions of the Coal Mines Act, 1911—(*a*) because he did not cause the respondent to be searched before he commenced work for the purpose of ascertaining whether he had a match in his possession nor immediately after entering the mine, and (*b*) because the search was not made by the fireman, the person authorized in writing to search at the said colliery, and consequently that the respondent could not properly be convicted on the evidence of having a match in his possession.

The question for the opinion of the Court was whether that determination was correct in law.

Disturnal, K.C., and *Lincoln Reed*, for the appellant. Sect. 35, sub-s. 1, of the Coal Mines Act, 1911, is an absolute prohibition against a person having in his possession in a mine a lucifer match or any of the other articles mentioned, and a contravention of that provision is made an offence against the Act: see s. 75. Sects. 101 and 103 provide for the penalty and for its recovery under the Summary Jurisdiction Acts. The fact that the respondent was searched by the appellant, who was not the authorized person, is immaterial.

[ROWLATT J. According to the view taken by the justices, a miner who has not been searched at all, but who produces a match from his pocket while he is in the mine, has committed no offence. That cannot be right.]

The offence is having a match while in the mine, and if that is proved the offence is complete.

Clive Lawrence (*Compston, K.C.*, with him), for the respondent. No offence is committed under s. 35 unless and until the man has been searched in the prescribed manner. That is clear from the language of sub-s. 4, which says in terms that a person who "on being searched is found to have in his possession any of the articles prohibited under this section, shall be guilty of an offence against this Act." Sub-s. 1 does not create an offence. In any view it has not been found that the match was found in the respondent's

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possession. The statements in the case are consistent with the match having been placed in the respondent's coat pocket by some other person, and if the Court takes the view that the justices were wrong in their construction of s. 35 the case should be sent back to them to hear evidence upon this question.

VISCOUNT READING C.J. In this case the justices came to the conclusion that, notwithstanding the fact that a match was found in the respondent's coat pocket, the respondent could not be convicted inasmuch as the appellant had not caused the respondent to be searched before he commenced work and the search was not made by the person properly authorized to make the search. In my opinion neither of these points is relevant to the matter that was before the justices. They considered that because of the words of s. 35, sub-s. 4, no offence under the section is committed unless the search has been properly made in accordance with the Act. That is not the correct reading of s. 35. Sub-s. 1 of that section makes it an offence for a person in a mine to have in his possession a lucifer match or any apparatus for producing a light or spark. The sole question is whether the fact that a person while in a mine has a match in his coat pocket is sufficient to constitute an offence. The justices have found as a fact that there was a match in the respondent's coat pocket, but because certain formalities which they considered to be conditions precedent to a conviction had not been complied with they refused to convict. In that view they were wrong, and the case must go back to them with our opinion on the law. It is right to say that the language of sub-s. 4 may possibly have raised some doubt in the minds of the justices, but an examination of the Act as a whole, and more particularly ss. 75, 101, and 103, makes it plain that a contravention of sub-s. 1 of s. 35 is an offence under the Act quite apart from the provisions of the other sub-sections of s. 35, and that that offence may be dealt with under the Summary Jurisdiction Acts.

As it has been argued that the justices have not found that the match was in the possession of the respondent, and as it is suggested that it may have been placed in the respondent's coat pocket by some other person, we think it right that the respondent should have an opportunity of raising that point before the justices if he desires

to do so. We express no opinion upon it. The case will go back to the justices with our opinion upon the construction of s. 35, sub-s. 1.

RIDLEY J. I agree. The justices must convict if they find that the match was in the possession of the respondent.

ROWLATT J. I am of the same opinion. The point is one of some importance. Sub-s. 1 of s. 35 prohibits the possession of a match by a person in a mine. By virtue of ss. 75, 101, and 103 a contravention of that prohibition becomes an offence punishable on summary conviction. There is nothing in the Act to make it a condition precedent to a prosecution for a contravention of sub-s. 1 that the discovery of the match should be due to a search. The words in sub-s. 4 are introduced to show that if a match or any other of the prohibited articles is found upon a person when searched before going into the mine he shall not only be prevented from entering the mine, but shall be liable to conviction. It is said, and perhaps rightly, that the search of the respondent by the appellant was unauthorized; but that does not affect the matter. It is a common fallacy that if evidence is obtained against an accused person by some means which might have been resisted no conviction can follow. There is no greater fallacy. Whether a collateral wrong has been committed does not matter. If there is admissible evidence of facts which establish guilt that is sufficient.

Appeal allowed; case remitted.

Solicitors for appellant: *Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.*

Solicitors for respondent: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

J. S. H

C. A.
1916
Dec. 7, 11.

[IN THE COURT OF APPEAL.]

HUMPHREYS *v.* MILLER.

Landlord and Tenant—Furnished Lodgings—Implied Warranty as to Fitness of Tenant.

There is no implied warranty on the taking of furnished lodgings that the intending tenant is a fit and proper person to occupy them and is not suffering from an infectious disease.

Application of the plaintiff for judgment or for a new trial in an action tried before Darling J. with a special jury.

The action was brought to recover damages for breach of warranty, fraudulent misrepresentation, and concealment against Miss Ivy Katherine Miller and Mr. A. W. Rendell, the executors of the late Mr. Harry Cleveland Miller, and Dr. E. A. Harbord.

Evidence was given that in July, 1914, Miss Miller had engaged furnished rooms in the plaintiff's house for herself and her father, who was then suffering from leprosy, as was alleged, to the knowledge of the defendant. They entered into occupation of the rooms on September 10, and on September 21 the defendant Dr. Harbord, who had previously attended Mr. Miller, was sent for and attended him till his death on December 16. It was alleged that the doctor had said that Mr. Miller was not suffering from an infectious disease but that care should be taken, and that no one should use the same lavatory as the patient. In consequence of letting the rooms a part of the plaintiff's furniture had to be destroyed, and he alleged other pecuniary loss.

The questions left to the jury with their answers thereto were as follows:—1. Was Mr. Miller when he entered or remained in the plaintiff's rooms liable to infect them or the furniture there with leprosy?—Yes. 1a. If so, did he or Miss Miller know it?—Yes, both. 2. Is leprosy infectious or contagious so as to be in England communicable from a leper to another person?—Yes. 3. Did Miss Miller and Dr. Harbord fraudulently misrepresent that Mr. Miller was a fit and proper person to occupy the plaintiff's rooms?—Yes. 4. Did Miss Miller and Dr. Harbord conceal from the plaintiff the fact that Mr. Miller was to their knowledge a leper and suffering from a disease which made him unfit and dangerous to occupy the

rooms ?—Yes. 5. Did Dr. Harbord, acting as agent for Miss Miller and Mr. Miller, state to Mrs. Humphreys that Mr. Miller was not suffering from any infectious or serious disease ?—Yes. 6. If so, were those statements untrue to the knowledge of either (if so, which) ?—Yes, to the knowledge of both. 7. Did Mr. Miller, Miss Miller, and Dr. Harbord conspire together to conceal the state of Mr. Miller from the plaintiff and to make false statements to the plaintiff for that purpose ?—Yes. 8. Damages ?—250*l.*

Darling J. held that there was no warranty implied in the contract of tenancy to the effect that Mr. Miller was a fit and proper person to occupy the plaintiff's lodgings, and further that there was no evidence that Miss Miller knew that her father was suffering from leprosy or that Dr. Harbord did more than express his honest professional opinion as to the non-infectious nature of leprosy in this country. He therefore gave judgment for the defendants.

The plaintiff appealed.

Hemmerde, K.C., and *Liversidge*, for the plaintiff. Where furnished lodgings are taken by one person for the accommodation of another who is subsequently brought there, there is an implied warranty on the part of the person so taking the lodgings that the other person is a fit and proper person to occupy the lodgings and that he is not suffering from any infectious disease. It must be admitted that no authority can be found for the existence of any such warranty, but it has been held that on the letting of furnished lodgings there is an implied warranty that they are fit for immediate occupation by the tenant: *Smith* v. *Marrable* (1); *Wilson* v. *Finch Hatton* (2); and it is submitted that there ought to be a similar and reciprocal duty on the other side. [They also contended that the findings of the jury as to concealment and misrepresentation were warranted by the evidence.]

[SWINFEN EADY L.J. referred to *Bird* v. *Lord Greville* (3), and also to ss. 126 and 129 of the Public Health Act, 1875.]

McCall, K.C., and *Neilson*, for the defendants Miller and Rendell, and *Gordon Hewart, K.C.*, and *Craig Henderson*, for the defendant Harbord, were not called upon to argue.

(1) (1843) 11 M. & W. 5. (2) (1877) 2 Ex. D. 336.
(3) (1884) Cab. & E. 317.

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SWINFEN EADY L.J. [After stating the facts his Lordship proceeded:] The first question which arises is whether any warranty is implied by law that when a person takes furnished rooms the proposed tenant is fit to occupy them—in other words, that he is not suffering from an infectious disease. It is admitted that there is no case in the books to support the proposition that there is any such warranty. No doubt when persons let rooms a warranty is implied that the premises are fit for immediate occupation; that is the result of the decisions in *Smith* v. *Marrable* (1) and *Wilson* v. *Finch Hatton*. (2) But that is a long way from the proposition suggested for our acceptance, and I am clearly of opinion that there is no foundation in law for the argument that a warranty ought to be implied from the intending tenant. If such a warranty is to be imposed, it must be imposed by statute. I agree with the view taken by Darling J., and think that this appeal must be dismissed. [His Lordship then dealt with the evidence as to concealment and misrepresentation, and came to the conclusion that there was no evidence of concealment against Miss Miller, nor of misrepresentation against Dr. Harbord.]

BANKES L.J. concurred.

A. T. LAWRENCE J. I am of the same opinion. On the facts I must come to the conclusion that the doctor did not make his answer fraudulently, but gave what he considered the true business view of the position. As to the question of implied warranty, the proposition is entirely novel, and I agree that if the contract is to be made subject to such an implied warranty it must be done by the Legislature, who have not done it. The principle seems to me a very extravagant one, and I agree that no such warranty can be implied.

Appeal dismissed.

Solicitor for plaintiff: *Tippetts.*

Solicitors for defendants Miller and Rendell: *Mason & Co.*

Solicitors for defendant Harbord: *Le Brasseur & Oakley.*

(1) 11 M. & W. 5. (2) 2 Ex. D. 336.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1917
Feb. 13.

SPORTS AND GENERAL PRESS AGENCY, LIMITED *v.* "OUR DOGS" PUBLISHING COMPANY, LIMITED.

[1915. S. 2699.]

Action, Cause of—Sole Right of taking Photographs.

An exclusive right to take photographs is not a form of property known to the law.

The promoters of a dog show purported to assign the sole photographic rights in connection with the show. The assignee purported to assign to the plaintiffs the sole Press photographic rights at the show. The promoters of the show did not cause any notice to be placed on the tickets of admission or otherwise forbid the taking of photographs at the show. An independent photographer took photographs of the dogs exhibited and sold certain of them to the defendants, and the defendants published the photographs so bought in an illustrated journal. In an action by the plaintiffs for an injunction to restrain them from continuing to do so:—

Held, that the action would not lie, inasmuch as the promoters of the dog show had, in law, no exclusive right of photographing anything there, and therefore could not assign that right as property. They could have acquired such a right by contract by making conditions as to admission, but they had not done so, and therefore the plaintiffs had failed to make out any cause of action.

Decision of Horridge J. [1916] 2 K. B. 880 affirmed.

APPEAL from the decision of Horridge J. at the trial of the action without a jury; reported [1916] 2 K. B. 880.

The action was brought for (inter alia) an injunction restraining the defendants from publishing in their newspaper called *Our Dogs*, or in any other publication, any photographs taken at the Ladies' Kennel Association Show other than photographs taken by the plaintiffs. The plaintiffs were a publishing company carrying on business in London, and the defendants, who carried on business in Manchester, were the proprietors and publishers of *Our Dogs*, a weekly illustrated journal devoted to dogs. In March, 1915, the Ladies' Kennel Association were about to hold a dog show, and hired the exclusive use of the Royal Botanical Gardens for that purpose for June 9. In the same month of March one Thomas Fall,

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a photographer carrying on business in Baker Street, London, by a contract contained in correspondence between him and the secretary of the Ladies' Kennel Association, bought from the association "the sole photographic rights in connection with" the dog show. Fall subsequently wrote to the plaintiffs offering to sell to them "the sole Press rights" at the association show. The plaintiffs by letter accepted that offer, and the learned judge found that they represented Fall so far as concerned the Press (including Press photographic) rights which he had obtained. The plaintiffs' case was that they became entitled to the sole right of reproducing, or procuring to be reproduced, any photographs taken by Fall or his agents of the show and of selling them for publication to the exclusion of any other person, including the defendants. They complained that, although the defendants were well aware of their and Fall's exclusive rights, they, in violation thereof, by their agent, one Baskerville, although previously warned and requested not so to do, took a number of photographs of the show at the Botanical Gardens on June 9, 1915, some or all of which they caused to be reproduced in their issue of *Our Dogs* of June 18, 1915. The defendants did not dispute the fact that Baskerville took the photographs nor the publication in *Our Dogs* of them, and the learned judge found as a fact that Baskerville took the photographs as the defendants' agent, and that when he brought the photographs to the defendants their manager was aware of the fact that on previous occasions the plaintiffs had made complaints about Baskerville; that the defendants knew that on this occasion the association had purported to make over the exclusive right of taking photographs at the show; and that when Baskerville took the photographs he knew he was infringing the rights of some one. The evidence for the defendants was that Baskerville carried on the business of a photographer and that he took the photographs of the show on his own account and not as agent of the defendants, and that he sold to the defendants certain photographs selected at the price of 5*s.* 3*d.* for each copy, and this was accepted by the Court of Appeal as the correct version of the transaction. The defence was, in substance, that the Ladies' Kennel Association had, in law, no right of property in the taking of photographs of their show, and therefore no power to sell the sole right of taking photographs of

the dog show, and that consequently neither Fall nor the plaintiffs had any legal right to complain of the fact that the defendants had published photographs taken at the show. The secretary of the Ladies' Kennel Association gave evidence to the effect that at the show on June 9 Baskerville asked her if he might take photographs and she referred him to Fall, who, she told him, had the sole photographic right. Her instructions were that no one but Fall should be allowed to take photographs in the show, but there was no notice on the tickets of admission or otherwise forbidding the bringing of cameras into the show or the taking of photographs there.

Horridge J. held that the plaintiffs had no right of property which the defendants had knowingly infringed and therefore had no cause of action, and gave judgment for the defendants.

The plaintiffs appealed.

N. L. Macaskie, for the plaintiffs. [The argument was the same as in the Court below, and is not repeated here. The following cases were cited :—*Exchange Telegraph Co.* v. *Gregory & Co.* (1) ; *Exchange Telegraph Co.* v. *Central News.* (2)]

Holman Gregory, K.C., and *W. Marshall Freeman*, for the defendants, were not called upon to argue.

SWINFEN EADY L.J. [After stating and discussing the facts, in the course of which he came to the conclusion on the evidence that Baskerville took the photographs as an independent photographer and not as the agent of the defendants, his Lordship proceeded :] The main question is whether the plaintiffs have any cause of action against the defendants for an infringement of their right of property. The question may be looked at as if the Ladies' Kennel Association were suing. It is said that that association had been put to trouble and expense in organizing the show, which was their property and which included the right to take photographs themselves and to grant the same right to others, and that they in fact granted it to Fall. In my opinion it is not accurate to speak of the right of taking photographs as property. No doubt the Ladies' Kennel Association had the grounds for the day, and also the right of allowing those persons to enter of whom they approved and excluding those of whom

(1) [1896] 1 Q. B. 147. (2) [1897] 2 Ch. 48.

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they did not, and that right carried with it the right of laying down conditions binding on the parties admitted; it might be a condition that they should not use cameras or should not take photographs or make sketches. But they did not lay down any such conditions; that was not the position taken up. Baskerville was admitted to the show and took photographs of the dogs exhibited; there was no contract between him and the Ladies' Kennel Association; indeed, it is not suggested that there was any breach of contract on his part. The answer to the plaintiffs' argument is that they could have acquired by contract such a right as they claim, and that they failed to do so.

BANKES L.J. I agree, and have nothing to add.

LUSH J. I agree. I only wish to add that if those who promote shows or exhibitions wish to prevent the taking of photographs, they must make it a matter of contract. I am clearly of opinion that there is no such right of property in the owner of land as is asserted by the plaintiffs.

Appeal dismissed.

Solicitor for plaintiffs: *Alfred Allistone.*

Solicitors for defendants: *Woodcock Ryland & Parker, for W. M. Whitehead, Manchester.*

W. J. B.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1917 *March* 12.
C. A. *March* 20.

THE KING *v.* COMMANDING OFFICER, 30TH BATTALION MIDDLESEX REGIMENT.

Ex parte FREYBERGER.

Alien—Natural-born British Subject—Austrian Subject—Double Nationality—Declaration of Alienage on attaining Full Age—Already enlisted in Army—Habeas Corpus—British Nationality and Status of Aliens Act, 1914 (4 & 5 *Geo.* 5, *c.* 17), *ss.* 1, 14—*Military Service Act*, 1916 (5 & 6 *Geo.* 5, *c.* 104), *s.* 1.

A natural-born British subject, who is also a subject of an enemy State, cannot in time of war make a declaration of alienage under s. 14 of the British Nationality and Status of Aliens Act, 1914, and cease to be a British subject, so as to become solely a subject of the enemy State.

So *held* by Swinfen Eady L.J. and Bray J. in the Court of Appeal (Bankes L.J. expressing no opinion), affirming the judgment of the Divisional Court.

A natural-born British subject, who was also an Austrian subject, but who was resident in England, was in July, 1916, enlisted in the Army under s. 1, sub-s. 1, of the Military Service Act, 1916. In January, 1917, he attained the age of twenty-one years, and made a declaration of alienage, and claimed thereby to have ceased to be a British subject and to be entitled to his discharge from the Army. Upon being refused his discharge he applied for a writ of habeas corpus :—

Held by the Court of Appeal (Swinfen Eady and Bankes L.JJ. and Bray J.), even assuming the applicant was entitled to make a declaration of alienage, that as, under s. 1, sub-s. 1, of the Military Service Act, 1916, the applicant was "deemed to have been duly enlisted for the period of the war," he was not entitled to be discharged from the Army.

RULE NISI for a writ of habeas corpus.

The applicant was born on January 23, 1896, in London; his parents were Austrian subjects resident in London, and by the law of Austria he became and remained (as the Court assumed for the purposes of this case) an Austrian subject. On November 9, 1897, his father was naturalized as a British subject. On February 20, 1916, the applicant, being resident in England, received a notice requiring him to join for military service on March 6. He appealed, and his appeal was dismissed; finally

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he received notice to join on July 19, 1916; he surrendered to the police, was taken before a magistrate, and was handed over to the military authorities; he was then placed in the 30th Battalion of the Middlesex Regiment. The applicant having attained the age of twenty-one on January 23, 1917, made a declaration of alienage on February 12 under s. 14 of the British Nationality and Status of Aliens Act, 1914. (1) He then claimed to be released from military service as an alien, but the military authorities refused to release him and referred him to the Home Secretary, who refused to register the declaration. The applicant thereupon obtained a rule nisi for a writ of habeas corpus directed to the commanding officer of the 30th Battalion of the Middlesex Regiment.

March 12. *Sir Gordon Hewart, S.-G.*, and *Branson* showed cause. It may be assumed that the applicant at his birth became an Austrian subject and has so remained ever since. He is also a British subject by reason of the provisions of s. 1 of the British Nationality and Status of Aliens Act, 1914. Sect. 14, sub-s. 1, of that Act provides that any person in such a position may, if of full age, make a declaration of alienage and thereupon cease to be a British subject. That Act was passed on August 7, 1914, and came into operation on January 1, 1915. Sect. 14, sub-s. 1, does not, however, apply in time of war to a person who is also a subject of an enemy State. Indeed, the general rule of international law is still wider, and a British subject cannot throw off his nationality at all during time of war even if it is only to become a subject of a neutral State: *Rex* v. *Lynch* (2); Halleck's International Law, 1st ed., ch. 29, s. 29; 4th ed., vol. 1, ch. 12, s. 29.

(1) 4 & 5 Geo. 5, c. 17, s. 1: "(1.) The following persons shall be deemed to be natural-born British subjects, namely:—

(*a*) Any person born within His Majesty's dominions and allegiance; . . . ."

Sect. 14: "(1.) Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject."

(2) [1903] 1 K. B. 444.

It is not desired in this case by the Crown to raise the point that a writ of habeas corpus is not the proper remedy.

R. V. Bankes, K.C., and *Conway*, in support of the rule. Upon the true reading of s. 14 of the Act of 1914 the right of any person who is a British subject and also a subject of a foreign State to make a declaration of alienage is preserved. The Act was passed after the commencement of the war, and therefore it must have been intended to preserve the right which any person had in time of peace. The Naturalization Act, 1870 (33 & 34 Vict. c. 14), under which *Rex* v. *Lynch* (1) was decided, was passed in time of peace, and therefore it could not have been intended by that Act to have any effect on the position of an alien in time of war. On that ground *Rex* v. *Lynch* (1) is distinguishable from the present case. Further, in that case Lynch was a British subject only, whereas here the applicant is both a British subject and an Austrian subject; and Lynch committed an act of treason in becoming naturalized in an enemy State. The question there arose under s. 6 of the Act of 1870, and not under s. 4, which corresponds with s. 14 of the Act of 1914. The applicant in the present case has a double nationality. The words and meaning of s. 14 are quite plain and unambiguous, and there cannot be read into the section an exception that the privilege of making a declaration of alienage cannot be exercised in time of war. There is nothing at all to be found in the section to cut down the meaning and operation of its language in that way. [They also referred to *Sawyer* v. *Kropp*. (2)]

VISCOUNT READING C.J. The applicant was born in London on January 23, 1896. In November, 1897, his father became a naturalized British subject. His father was until then an Austrian subject. The applicant, after the Military Service Act, 1916, became liable to serve in His Majesty's Forces, and, not having complied with the law, he on August 24, 1916, was charged as an absentee; he was handed over to the military authorities, and in September, 1916, he was tried by court-martial and sentenced for refusing to obey military orders. On February 12, 1917, he made a declaration of alienage, he having on January 23, 1917, come of age; and by virtue of Austrian law, he being the son of an Austrian

(1) [1903] 1 K. B. 444. (2) [1916] W. N. 284; 85 L. J. (K.B.) 1446.

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Viscount Reading C.J.

subject, apparently remained an Austrian subject notwithstanding that he was born in this country and his father had become a naturalized British subject. I deal with the case upon the assumption that that is the true view of the Austrian law.

It is said that, by virtue of s. 14 of the British Nationality and Status of Aliens Act, 1914, this declaration of alienage operates to divest the applicant of his British nationality and to make him henceforward an Austrian subject. By that section it is enacted [His Lordship read the section]. The contention on behalf of the applicant is that, having made this declaration, he ceased to be a British subject under this section of the Act, and consequently ceased to be under British military law, and is therefore entitled to an order from this Court discharging him from the Army, deciding, in effect, that he is no longer subject to military law.

The main question, in my judgment, turns upon s. 14. Taken literally, without regard to any general principle which may be invoked to limit the operation of the section, the applicant is entitled to make his declaration of alienage after he has come of age, and would then cease to be a British subject.

It has been argued by the Solicitor-General that the section must be read subject to the general principle of British law, which is also a rule recognized in international law, that a subject cannot divest himself of his allegiance to the Crown by becoming a naturalized subject of an enemy State during a period of war—in other words, that this right given by s. 14 must be construed subject to the general principles of law applicable during time of war. I have come to the conclusion that a person cannot divest himself of his British nationality during time of war, and become a subject of an enemy State, and that this section must be read subject to that well-known principle. If any authority is required for this principle, it is to be found in *Rex* v. *Lynch* (1) and Halleck's International Law. (2)

I do not propose to express any opinion upon the point which has been discussed as to whether this principle would equally apply if a British subject wished in time of war to divest himself of his allegiance so as to become the subject of a neutral State;

(1) [1903] 1 K. B. 444, 459.
(2) 1st ed., ch. 29, s. 29; 4th ed., vol. 1, ch. 12, s. 29.

but in *Rex* v. *Lynch* (1) Lord Alverstone C.J. in his judgment made it plain that a British subject could not become naturalized as a subject of an enemy State during war. That principle is applicable to this case. As Wills J. said in his judgment, if the contrary view were to prevail, "an army might, if each member of it were individually to accept letters of naturalization from the enemy, desert in the hour of battle without rendering any of its members liable to the penalties of treason." Of course it may be said it is difficult to see how those circumstances could occur during war; but for the purpose of testing the point they form a very useful argument.

Having come to this conclusion, I think that it really decides this case. I hold that, notwithstanding s. 14 of the Act of 1914, it is not open to a British subject to make a declaration of alienage under that section during war and divest himself of his allegiance to the British Sovereign and become a subject of an enemy State. It is to be observed partly on the ground that I find no words in the section which limit the rights and obligations of a British subject during the period when he is also the subject of another State. The full rights are given to him as a British subject, and he must be regarded as a natural-born British subject with the full rights and obligations of a British subject at the time he wishes to make his declaration of alienage, and cannot therefore in time of war make a valid declaration of alienage and become an enemy subject.

I do not propose to deal with the second point, which does not arise.

With regard to the third point, I only wish to say that I do not at present agree with the contention that, because the applicant would be liable to be interned if it were once held that he was a subject of enemy nationality, therefore this Court must of necessity say that he cannot apply to this Court for a writ of habeas corpus and must for present purposes be regarded as a prisoner of war. In the view which I take it is not necessary to express a definite opinion on this point. I decide the case upon the first point, and therefore think that this rule must be discharged.

(1) [1903] 1 K. B. 444, 459.

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RIDLEY J. I am of the same opinion. I decide this case upon the first point, and I think it clear, after considering the case of *Rex* v. *Lynch* (1), that, under s. 14 of the British Nationality and Status of Aliens Act, 1914, the declaration of alienage therein mentioned cannot be made in time of war. This section appears to be parallel with s. 4 rather than with s. 6 of the Act of 1870. The 4th section of that Act deals with how a British-born subject ceases to be such by making a declaration of alienage; but *Rex* v. *Lynch* (1), in 1903, was decided under the 6th section, which enacts: "Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien." Lynch at the time when he made the declaration, or, what was equivalent to a declaration, the statement of his naturalization in the South African Republic, was a British subject. He was in a foreign and enemy land, and it was because he had made the statement in that land that the question arose whether or not that was a valid act, so that he could say that it prevented him from having committed treason against this country. The decision of the Court was that it was an act of treason because it was committed during time of war. Now it was stated that there might be a difference between that decision and this, because the Lord Chief Justice said in his judgment (2): "But further, I am clearly of opinion that s. 6 does not empower a British subject to become naturalized in an enemy country during time of war, and that consequently the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury." But I do not find that, either in his own judgment or in that of Wills J. or of Channell J., any reliance is at all placed upon the fact that Lynch was in the enemy country when he claimed to be naturalized in an enemy State.

The other point that has been raised by which a distinction is sought to be drawn between that case and this is that there was no dispute as to the nationality of Lynch at the time when he made

(1) [1903] 1 K. B. 444, 459. (2) [1903] 1 K. B. 458

the declaration, or what was equivalent to a declaration; whereas here the applicant is not only a British subject under s. 14, but he is also a subject of Austria by reason of the laws of that country, which I assume to be the fact. I cannot see that that makes any difference. A man is not half a subject of one State and half of another State. It is an unfortunate thing for him in time of war if he owes a double allegiance, but it seems to me that the true way to view the question in spite of that difficulty is to say that he is completely a subject of each State. The statute gives him the opportunity on becoming of full age, not being under disability, to make a declaration of alienage and so cease to be a British subject. That is the only relief that is afforded him. Until that time he owes his allegiance to each country, and I do not see how a distinction can be drawn on such a ground as that between the case of *Rex* v. *Lynch* (1) and the present case.

I say nothing about the other point, but simply that upon this ground the reasoning in *Rex* v. *Lynch* (1) makes it necessary to decide this case in favour of the Crown.

HORRIDGE J. The Solicitor-General, in this case, has argued it upon the assumption that if we were not in time of war the applicant would be entitled to make the declaration under s. 14 of the British Nationality and Status of Aliens Act, 1914, but he says that the principle which is stated by Channell J. applies to this case, namely (2): "And it is not disputed that before the Act naturalization in a foreign State with which we were at peace was legal, but in an enemy State was obviously illegal and an act of treason." In this case the applicant endeavours to lose his allegiance to this country and to become solely the subject of a country with which we are at war. Does the same principle apply to s. 14 of the Act of 1914 in the same way as it did to s. 6 of the Act of 1870? Let us look at s. 14. Sect. 14 does not put the applicant until he makes the declaration in any state of uncertainty. It makes him a British subject for all purposes, and it is only by doing an act himself, namely, making a declaration, that he ceases to be a British subject; and therefore I see no reason why the principle which was applied in *Rex* v. *Lynch* (1) should not apply in this case, inasmuch as he

(1) [1903] 1 K. B. 444. (2) [1903] 1 K. B. 459.

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does not cease to be a British subject until he makes the declaration. In my opinion that declaration cannot be made after the declaration of war, so as to make the applicant solely the subject of a State at war with this country.

I do not desire to deal with any further question as to whether the section would be construed in the same way in a case where the person asking to make the declaration would become the subject of a friendly State. My judgment in this case must be taken to be limited to the case where he is a subject also of a State at war with this country and asks to make a declaration abandoning his status as a British subject when he is at the same time the subject of an enemy country.

Rule discharged.

J. H. W.

The applicant appealed.

March 20. *R. V. Bankes*, *K.C.*, and *Conway*, for the appellant. The appellant is entitled to make a declaration of alienage under s. 14 of the British Nationality and Status of Aliens Act, 1914. This is the only point decided by the Divisional Court. [The arguments upon this point were the same as in the Court below. Wheaton's International Law, 4th English ed., p. 460, was referred to in addition to the authorities cited in the Court below.]

Next, it is said that, as the appellant has, under s. 1 of the Military Service Act, 1916 (1), been "deemed to have been duly enlisted" in the Army "for the period of the war," he cannot get a writ of

(1) 5 & 6 Geo. 5, c. 104, s. 1, sub-s. 1: "Every male British subject who—

"(*a*) on the fifteenth day of August, 1915, was ordinarily resident in Great Britain, and had attained the age of eighteen years and had not attained the age of forty-one years; and

"(*b*) on the second day of November, 1915, was unmarried or was a widower without any child dependent on him;

shall, unless he either is within the exceptions set out in the First Schedule to this Act, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours or in the reserve for the period of the war. . . . ."

habeas corpus to obtain his discharge from the Army. The answer to that contention is that the appellant, as a British subject, became a soldier in the British Army in July, 1916, subject to his right under s. 14 of the British Nationality and Status of Aliens Act, 1914, on attaining the age of twenty-one years to make a declaration of alienage; and having made that declaration, he thereupon ceased to be a British subject. During his residence in this country the appellant had a right, at first under s. 4 of the Naturalization Act, 1870, and afterwards under s. 14 of the Act of 1914, to make a declaration of alienage and thereupon to cease to be a British subject. It is inconceivable that the Legislature can have intended inferentially to deprive him of that right by the Act of 1916. If the contention of the respondent is correct, the appellant will be guilty of treason to Austria by joining the British Army and fighting against Austria. [They also referred to the Army Act, 1881 (44 & 45 Vict. c. 58), ss. 90, 92, as to a soldier being discharged from the Army.]

Sir Gordon Hewart, S.-G., and *Branson*, for the respondent, were not called upon.

SWINFEN EADY L.J. This is an appeal from a decision of the Divisional Court discharging a rule nisi for a writ of habeas corpus. The rule was addressed to the commanding officer of the 30th Battalion of the Middlesex Regiment, the appellant being now a soldier and under the control of the military authorities. The appellant alleges that since he entered the Army he has become solely the subject of an enemy State, namely, Austria, and that he is entitled to have his discharge from the Army. The appellant was born in London on January 23, 1896. His father was at the date of the appellant's birth an Austrian subject, but on November 9, 1897, he became a naturalized British subject and took the oath of allegiance. The appellant, having been born in London, is undoubtedly a British subject, but he contends that he is also an Austrian subject, and that he was entitled under the provisions of s. 14, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914, on attaining the age of twenty-one years, to make a declaration of alienage, and that having made that declaration he ceased to be a British subject. The evidence in support of his

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claim to be entitled to make a declaration of alienage under s. 14, sub-s. 1, is very deficient. [The Lord Justice referred to the evidence on the point, and came to the conclusion that the appellant had failed to show that he was also regarded by the law of Austria as an Austrian subject.] But assuming for the purpose of this case that he has satisfied the Court that he is an Austrian as well as a British subject, the question arises whether he is entitled to make a declaration of alienage under s. 14, sub-s. 1, of the Act of 1914 so as to become solely an Austrian subject and divest himself of his British nationality. [The Lord Justice read the sub-section.] Sect. 19 of the Act provides that the Secretary of State may make regulations, and by the British Nationality and Status of Aliens Regulations, 1914, made on December 30, 1914 (1), it is provided in reg. 10 that every declaration of alienage and declaration of retention or resumption of British nationality, wherever made, shall be registered in London at the Home Office; and by reg. 14 a fee of 10*s.* is prescribed for the registration. The appellant has made a declaration, but the Home Secretary has declined to register it. Assuming again in his favour that the declaration is valid, though not registered, the question remains, Can the appellant validly make a declaration of alienage during the existence of a state of war between this country and Austria?

It is said that s. 14 in terms enables him to do so, and that if it is to be held that he is prevented from doing so by the existence of a state of war words must be read into the section which are not there. Exactly the same argument was addressed to the Court in the case of *Rex* v. *Lynch*. (2) That case arose under s. 6 of the Naturalization Act, 1870, which provided that "Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien." Lynch being a British subject was in a foreign State, the South African Republic, which was at war with this country, and he became naturalized in that State. The Court held that the

(1) See Statutory Rules and Orders, 1914, vol. 1, pp. 238—247.
(2) [1903] 1 K. B. 444.

Act did not empower a British subject to become naturalized in an enemy State during war. Lord Alverstone C.J. said (1): "I am clearly of opinion that s. 6 does not empower a British subject to become naturalized in an enemy country during time of war"; and he so decided, the other members of the Court agreeing. In my opinion, the same principle is applicable to the construction of s. 14, sub-s. 1, of the Act of 1914. A British subject, although having a double nationality, cannot during a state of war divest himself of his allegiance to the British Crown in order to become solely the subject of an enemy State. On that ground alone I am of opinion that the appellant's case fails.

But there is a further ground upon which it also fails. By s. 1, sub-s. 1, of the Military Service Act, 1916, every male British subject who on August 15, 1915, was ordinarily resident in Great Britain, and had attained the age of eighteen and had not attained the age of forty-one, and on November 2, 1915, was unmarried or was a widower without any child dependent on him—the appellant comes within that description—shall, unless he is within certain exceptions not material to this case, "be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours or in the reserve for the period of the war." The appellant was on the appointed date a male British subject within the ages specified, and therefore is deemed to have duly enlisted for the period of the war. That being so, why is he entitled to obtain his discharge? Assuming for this purpose that he can divest himself of his British nationality and become an alien, why is he entitled to his discharge from the Army? The Act does not so provide. It says that when a person is once enrolled in the Army he is deemed to have been duly enlisted for the period of the war. I see no ground upon which the appellant is entitled to claim his discharge from the Army. There is nothing in the provisions of the Army Act, 1881, which says that if a person becomes an alien he shall thereupon be entitled to be discharged from the Army. Even, therefore, if the appellant were right upon the first point, in my opinion he fails upon the second, and, being properly within the control of the military authorities, he is not entitled to discharge even if he has become an alien.

(1) [1903] 1 K. B. 458.

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For these reasons I am of opinion on both these grounds that the appeal fails and should be dismissed.

BANKES L.J. I agree. It is sufficient for the purpose of disposing of this appeal to consider the second point. It seems to me to be plain from the language of s. 1, sub-s. 1, of the Military Service Act, 1916, that on the appointed date the applicant became subject to the Act, and acquired a certain statutory status—the status of a person duly enlisted for the period of the war. Having acquired that statutory status, he cannot, in my opinion, by any voluntary act on his part, whether it be a formal declaration of alienage under the Act of 1914, assuming for the moment that he could make it, or any less formal act, divest himself of that status. This seems to me to be a sufficient ground to dispose of the appeal.

BRAY J. I agree on both the points which have been dealt with by Swinfen Eady L.J. and for the reasons given by him.

As regards the non-registration of the declaration, I do not desire to express any opinion, but if it is the intention of the Secretary of State that registration shall be a condition precedent to the validity of the declaration, he can easily make it clear by amending the regulations to that effect.

Appeal dismissed.

Solicitors for applicant: *Oppenheimer, Blandford & Co.*
Solicitor for Crown: *Treasury Solicitor.*

W. F. B.

[IN THE COURT OF APPEAL.]

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MILLER, GIBB & CO. *v.* SMITH & TYRER, LIMITED.

[1915 M. 2010.]

(LIVERPOOL DISTRICT REGISTRY.)

Principal and Agent—Foreign Principal—Liability of Agent—Custom of Merchants—Presumption—Rebuttal.

A contract for the sale of lumber was in the following form:—"Contract by which our principals sell through the agency of Smith & Tyrer, Ltd." (the defendants), "wood brokers, Liverpool, and Messrs. Miller, Gibb & Co." (the plaintiffs), "of Liverpool, buy the wood goods specified below, foreign measure, of the usual manufacture and of the classification of the surveyors at the port of shipment." The price was to include freight and insurance to South Africa. Then followed clauses in which reference was made to the "seller" and the "buyer," and there was an arbitration clause by which the parties agreed to submit all disputes arising out of the contract to arbitration in England, and in case any action was brought it was to be brought in England and determined according to English law. The contract was signed "By authority of our principals, Smith & Tyrer, Ltd., Chas. T. Tyrer, managing director, as agents." The contract was made by the defendants on behalf of foreign principals, who had given the defendants authority to make the contract on their behalf so as to pledge their credit, but whose names were not disclosed to the plaintiffs. In an action to recover damages for breach of the contract the plaintiffs sought to make the defendants personally liable thereon under a general custom of merchants that when an agent contracts on behalf of a foreign principal he undertakes the liability of principal:—

Held, that, assuming that the custom still existed, it was one by which the agent alone was liable to the exclusion of the foreign principal; that the custom did not apply where it was inconsistent with the contract; that the contract sued on was one upon which the foreign principals were directly liable to the plaintiffs; and that therefore the custom was inconsistent with the contract and was not applicable.

APPEAL from the judgment of Avory J. at the trial of the action without a jury.

The action was brought to recover damages for breach of three contracts in writing dated respectively July 28, 1914, February 25, 1915, and February 27, 1915. The contracts were in the same form.

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Taking the first contract as a sample of all, it was (so far as material) as follows :—

"Contract by which our principals sell through the agency of Smith & Tyrer, Ltd." (the defendants), "wood brokers, Liverpool, and Messrs. Miller, Gibb & Co." (the plaintiffs), "of Liverpool, buy the wood goods specified below, foreign measure, of the usual manufacture and of the classification of the surveyors at the port of shipment. For shipment promptly." Then followed a description of the goods, and the price per cubic foot or superficial foot, as the case might be. "The prices are all in British sterling money per as above including freight and insurance to Cape Town, S. Africa. . . . . Payment of amount of invoice (after deducting freight calculated on foreign measure) to be by cash less $2\frac{1}{2}$ per cent. discount on advice of actual direct shipment and in exchange for shipping documents, including a good policy of insurance. . . . .

"Should the seller by reason of war, restraints of rulers, or by fire, ice, floods, droughts, storms, strikes, combinations, non-fulfilment of charters, or any extraordinary occurrence beyond their control, be unable to ship the whole or any portion of the goods, this contract to be null and void to the extent of such damage. Should the vessel or vessels fixed for this contract be lost after the name being declared to the buyer, then seller to have the option of substituting another vessel or vessels, or cancelling the contract. The seller shall not be responsible for any deviation from contract named herein, by reason of the ship returning or losing any part of the cargo.

"Should any dispute arise in regard to any matter in connection with this contract, or should the shipment be delayed beyond the time named in this contract, the buyer shall not reject the goods, if shipped, nor refuse acceptance, but shall make due payment as herein agreed; but such payment shall not affect the right, if any, to claim compensation for any breach of this contract by the seller. No claims to be made or entertained on any parcel broken into, nor after 14 days from its being discharged.

"In all disputes that may arise out of this contract all the parties expressly agree to submit the same to arbitration in England. Expenses of such arbitration to follow award or as the arbitrator may direct, and in case any action is brought for any matter arising

out of this agreement, such action shall be brought in England and determined according to English law."

The contract was signed: "By authority of our principals,
"Smith & Tyrer, Ltd.,
"Chas. T. Tyrer, managing director,
as agents."

The defendants in fact signed the contracts as agents for foreign principals, Messrs. E. Sondheimer & Co., of Memphis, U.S.A., who, as the learned judge at the trial found, had given the defendants authority to make the contracts on their behalf and to pledge their credit, but whose names were not disclosed to the plaintiffs at the time when the contracts were made.

The action was brought to recover damages for breach of the three contracts in not delivering the lumber. The only question raised was whether the defendants were personally liable on the contracts. No particular usage making the defendants personally liable was proved.

Avory J. gave judgment for the plaintiffs. He said that if an agent in England contracted on behalf of a foreign principal he was presumed to contract personally unless that presumption was rebutted by the terms of the particular contract or by the surrounding circumstances. He came to the conclusion from the whole contract and from the evidence as to the nature of the goods and other matters that the plaintiffs knew that the defendants were making the contracts as agents for a foreign principal, but he could see nothing to show that the plaintiffs were intending to contract with a foreign principal. He accordingly came to the conclusion that the presumption had not been rebutted, and he gave judgment for the plaintiffs.

The defendants appealed.

Langdon, K.C., and *G. D. Keogh* (for *R. E. Gething*, serving with His Majesty's Forces), for the defendants. The contracts were made by the defendants as agents for foreign principals. The defendants are described therein as "wood brokers," and the contracts are signed by them "By authority of our principals, Smith & Tyrer, Ltd., Chas. T. Tyrer, managing director, as agents." Throughout the contracts the obligations are imposed upon "the seller" and

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"the buyer." The contracts are clearly contracts made by the foreign principals through the agency of the defendants. If the principals were undisclosed English principals the contention of the plaintiffs could not be sustained. It is equally unsustainable in the case of foreign principals. The fact that the principals are foreign makes no difference. In *Hutchinson* v. *Tatham* (1) a trade usage was proved making the defendant, who contracted as agent, personally liable, and it was held, upon the authority of *Humfrey* v. *Dale* (2) and *Fleet* v. *Murton* (3), that the defendant was liable; and in *Southwell* v. *Bowditch* (4) it was held that in the absence of usage the defendant was not personally liable. In these cases the principals were not foreign principals. In *Mahony* v. *Kekulé* (5) and *Green* v. *Kopke* (6) the principals were named foreign principals, and in each case the agent was held not to be personally liable on the contract, the Court stating that it was a question of intention to be gathered from the terms of the contract, and that there was no distinction in this respect between an English and a foreign principal. The mere fact that the foreign principal's name is not disclosed in the contract does not make the agent liable. As Jervis C.J. said in *Green* v. *Kopke* (7), "the fact of the principal being a foreigner is entitled to some weight; but there is no rule of law . . . . that the agent is in all cases liable personally where the principal is a foreigner residing abroad. It is in all cases a question of intention, capable of being explained by the custom or usage of trade where any such can be shewn to exist." Again, in *Gadd* v. *Houghton* (8) an agent selling "on account of" a named foreign principal was held not to be personally liable. In *Hahn* v. *North German Pitwood Co.* (9) an agent who signed a contract "as agent" for a foreign principal was held not to be personally liable. In *Wilson* v. *Zulueta* (10) the judges dealt with the matter in the same way. As Coleridge J. said, "the question is to whom, upon that contract, the credit is given." The contract being in writing, there is no presumption that an agent contracting on behalf of a foreign principal is personally liable.

(1) (1873) L. R. 8 C. P. 482.
(2) (1857) 7 E. & B. 266; (1858) E. B. & E. 1004.
(3) (1871) L. R. 7 Q. B. 126.
(4) (1876) 1 C. P. D. 374.
(5) (1854) 14 C. B. 390.
(6) (1856) 18 C. B. 549.
(7) Ibid. 558.
(8) (1876) 1 Ex. D. 357.
(9) (1892) 8 Times L. R. 557.
(10) (1849) 14 Q. B. 405, 414, 416, 417.

The two rules stated in the notes to *Thomson* v. *Davenport* (1) are: "1. That where A. contracts with B., without stating himself to be an agent, B. may, on discovering his principal, elect between them." "2. That the rule is the same where he states himself to be an agent, but does not name his principal. Further, the rule is the same, though he names his principal, if the other contracting party does not, at the time of making the contract, trust the agent exclusively: *Calder* v. *Dobell.* (2) In these two rules it is assumed that the form of the contract is such as to render the agent at all events personally liable on it as a party." Therefore, unless the form of the contract renders the agent personally liable, resort cannot be had to him. In the present case the contract is in terms with the foreign principals, and any presumption of liability in the agents is rebutted. [They also referred to *Repetto* v. *Millar's Karri and Jarrah Forests, Ld.* (3)]

Greer, K.C., and *Greaves Lord*, for the plaintiffs. Notwithstanding the fact that by the terms of the contract an agent says that he is acting for a principal, it is possible in law to imply a contract that the agent will accept the liability of the principal. Where the principal is in England, the liability of the agent is proved by a custom or usage in the particular trade. Where the principal is a foreigner residing abroad, there is a presumption of law, if the contract is not inconsistent therewith, that the agent, though he contracts as agent, renders himself personally liable on the contract. That presumption depends upon a term to that effect being implied arising out of the general custom of merchants: *Humfrey* v. *Dale.* (4) The law implies a custom in such a case. The custom is only wanted when the agent contracts as agent; it is not required when he contracts as principal. It is admitted that if the name of the foreign principal is disclosed at the time when the contract is made, that fact will probably rebut the presumption. The custom is well-established, and is stated by Lord Tenterden C.J. in *Thomson* v. *Davenport* (5) as follows: "There may be another case, and that is where a British merchant is buying for a foreigner. According to

(1) 2 Sm. L. C., 12th ed., pp. 367, 368.
(2) (1871) L. R. 6 C. P. 486.
(3) [1901] 2 K. B. 306, 310.
(4) 7 E. & B. 266; E. B. & E. 1004.
(5) (1829) 9 B. & C. 78, 87.

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the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner." In *Armstrong* v. *Stokes* (1) the rule is stated to the same effect by Blackburn J., who said that the rule is so well known "that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit": see also *Harper & Sons* v. *Keller, Bryant & Co.* (2) In *Humfrey* v. *Dale* (3) and *Fleet* v. *Murton* (4) the contracts were similar to those in the present case, namely, a sale "to our principal," the contract note in each case being signed by the agents as "brokers." In each of those cases a trade custom was proved—in the first, that, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser; and, in the second, that, if the brokers did not name their principal in the contract note itself, the brokers were held personally responsible on the contract. A similar trade usage or custom was proved in *Hutchinson* v. *Tatham* (5) and *Pike* v. *Ongley*. (6) Those were not cases of foreign principals, and therefore a trade custom had to be proved to render the agent liable. But in the case of an agent for a foreign principal the general custom of merchants applies. The custom in the case of a foreign principal is founded upon the inconvenience of one of the contracting parties having to sue the other party in a foreign country. The presumption is two-fold: First, that the agent has no authority to pledge the foreign principal's credit. That was the proposition with which Lord Tenterden C.J. in *Thomson* v. *Davenport* (7) and Blackburn J. in *Armstrong* v. *Stokes* (8) were dealing, and it does not apply to the present case because the foreign principals gave the defendants express authority to pledge their credit. Second, that the agent is personally liable. In such a case the agent accepts the liability of a principal, but the custom does not exclude the liability of the foreign principal as well, if he has given the

(1) (1872) L. R. 7 Q. B. 598, 605.
(2) (1915) 84 L. J. (K.B.) 1696.
(3) 7 E. & B. 266; E. B. & E. 1004.
(4) L. R. 7 Q. B. 126.
(5) L. R. 8 C. P. 482.
(6) (1887) 18 Q. B. D. 708.
(7) 9 B. & C. 87.
(8) L. R. 7 Q. B. 605.

agent authority to pledge his credit. *Pike* v. *Ongley* (1) shows that such a custom is not inconsistent with the contract. This part of the custom applies to the present case, and the learned judge was right in coming to the conclusion that there was nothing in the contracts inconsistent with it. [*Schmaltz* v. *Avery* (2) and Anson on Contracts, 13th ed., pp. 403, 404, were also referred to.]

[BANKES L.J. referred to *Elbinger Actien-Gesellschaft* v. *Claye*. (3)]

Langdon, K.C., in reply.

Cur. adv. vult.

March 28. SWINFEN EADY L.J. read the following judgment :— The plaintiffs brought this action to recover damages for breach of three contracts in writing for the sale of lumber dated respectively July 28, 1914, February 25, 1915, and February 27, 1915. The action was tried at Liverpool by Avory J. without a jury, and he gave judgment for the plaintiffs, the amount of the damages to be ascertained by the official referee. The defendants appeal, and contend that they are not under any liability to the plaintiffs upon the contracts in question, but that, assuming there has been a breach, the persons alone liable to the plaintiffs are Messrs. E. Sondheimer & Co., of Memphis, the defendants' principals.

The contracts are all in the same form, so far as material for the purposes of this appeal. Each is expressed to be a " Contract by which our principals sell, through the agency of Smith & Tyrer, Ltd., wood brokers, Liverpool, and Messrs. Miller, Gibb & Co., of Liverpool, buy the wood goods specified below, foreign measure, of the usual manufacture and of the classification of the surveyors at the port of shipment. For shipment promptly "—then follows a description of the lumber sold—c.i.f. Cape Town. " Payment of amount of invoice (after deducting freight calculated on foreign measure) to be by cash less $2\frac{1}{2}$ per cent. discount, on advice of actual direct shipment and in exchange for shipping documents." Then, amongst other clauses in the printed form of contract, there is a clause : " Should the seller by reason of war, restraints of rulers, or by fire, ice, floods, droughts, storms, strikes, combinations, non-fulfilment of charters or any extraordinary occurrence beyond their

(1) 18 Q. B. D. 708. (2) (1851) 16 Q. B. 655.
(3) (1873) L. R. 8 Q. B. 313.

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control, be unable to ship the whole or any portion of the goods, this contract to be null and void to the extent of such damage. Should the vessel or vessels fixed for this contract be lost after the name being declared to the buyer, then seller to have the option of substituting another vessel or vessels, or cancelling the contract. The seller shall not be responsible for any deviation from contract named herein by reason of the ship returning or losing any part of the cargo." Then follows a provision for arbitration in England in case of any dispute, and for any action to be brought in England and determined according to English law. The contract was signed as follows: "By authority of our principals, Smith & Tyrer, Ltd., Chas. T. Tyrer, managing director, as agents." The judge at the trial was unable to find as a fact that the name of the defendants' foreign principals was disclosed to the buyers; he did, however, find as a fact that the defendants had authority to make the contract in question on behalf of their foreign principals, and to pledge the credit of their foreign principals.

Upon the construction of the written contract it is not open to any reasonable doubt that the contract was between the defendants' principals as vendors and the plaintiffs as purchasers. The contract so provides in plain terms. The defendants do not express themselves as agreeing to sell, even as brokers or agents. The contract, which is a printed form, provides in various clauses for certain rights and obligations of "the buyer" and "the seller." As matter of construction, the seller is "our principals," and not the defendants; "our principals" are certainly liable as sellers to the plaintiffs on the contracts in question. "Our principals" are directly liable to the plaintiffs by reason of the form of the contract and the authority of the defendants to bind them and pledge their credit. Indeed, it was not disputed by the respondents that the principals as the sellers were liable to them; and moreover on the face of the contract the defendants state that the contract is made "By authority of our principals." It is, however, contended that the defendants are also liable to the plaintiffs, and that the latter are entitled to elect whether they will sue the defendants or the foreign principals, and that they have made their election by suing the defendants.

The argument on behalf of the plaintiffs was to this effect: It was

said that, notwithstanding the terms of a contract that the agent is only agent, it is possible to imply a contract that the agent will accept liability as principal; that, if the principal be an English one, it may be proved that by the custom of the trade the agent is regarded as liable as principal and the dealing takes place on this footing, and thus the custom becomes an implied term of the contract and the agent is personally liable. *Humfrey* v. *Dale* (1) and *Fleet* v. *Murton* (2) were cited as instances of the application of this rule.

It was next contended that if you may read into a contract a custom not inconsistent with it, upon due proof of such custom, then as the law takes notice of the general custom of merchants you must read into the present contract what was alleged to be such general custom, namely, that in the case of a contract made here by a British agent on behalf of a foreign undisclosed principal the agent becomes personally liable on the contract.

As there was not in the present case any evidence of any particular custom, the plaintiffs can only rely upon some generally recognized custom. The plaintiffs relied upon the statement of the custom by Lord Tenterden in *Thomson* v. *Davenport* (3); and by Blackburn J. in *Armstrong* v. *Stokes* (4): "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and

(1) 7 E. & B. 266; E. B. & E. 1004.
(2) L. R. 7 Q. B. 126.
(3) 9 B. & C. 78, 87.
(4) L. R. 7 Q. B. 598, 605.

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so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit. Where the constituent is resident in England, the inconvenience is not so great, and we think that, prima facie, the authority is given, unless there is enough to shew that it was not in fact given." And in *Elbinger Actien-Gesellschaft* v. *Claye* (1) Blackburn J. said: "I quite agree that a man may, as agent, make a contract upon such terms as not only to bind himself but also so as to bind the principal; in other words, so that the principal shall be party to the contract, and may then either sue or be sued. I must say I think that the two things are correlative. A man cannot make a contract in such a way as to take the benefit, unless also he take the responsibility of it. But although such a contract may be where the principals are English; yet where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorised the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner. The dicta which I referred to of Chief Justices Sir J. Mansfield (2) and Lord Tenterden (3) and of Bayley J. (3), are to this effect; and the passage which I read from the judgment in *Armstrong* v. *Stokes* (4) expressly enunciates this proposition."

In the present case, however, the foreign principal is admittedly bound by the terms of the contract made on his behalf and by his authority. The custom to which the plaintiffs refer is a custom whereby the agent alone is liable to the exclusion of his principal. The foundation of the custom is the presumption that the agent has not power to pledge the credit of his foreign principal, and therefore that the foreign principal is not under any liability to the person

(1) L. R. 8 Q. B. 313, 317.
(2) See *Addison* v. *Gandassequi* (1812) 4 Taunt. 574, 580.
(3) See *Thomson* v. *Davenport*, 9 B. & C. 87, 89.
(4) L. R. 7 Q. B. 605.

with whom the commission agent is contracting. In these cases the only liability of the foreign principal is to his own agent, and the agent is alone liable to the person with whom he makes the contract. If upon the contract the foreign principal is directly liable to the person with whom the agent contracts, this provision is inconsistent with the custom, and the custom is thereby excluded. The case of *Gadd* v. *Houghton* (1) established that agents are not personally liable, although acting for foreign principals, if the contract itself shows an intention to make the foreign principals and not the agents liable. It was pointed out in *Pike* v. *Ongley* (2) that a custom cannot be read into a contract with which it is inconsistent. In that case the custom proved was to add the liability of the agent to that of the principal, if the name of the principal was not disclosed at the time of the making of the contract. There was nothing inconsistent with the owner being liable that the broker should also be liable; but it would have been inconsistent with a contract under which the owner was liable if the custom had been to exclude the liability of the owner. Where the general custom is that the agent shall be personally liable, and not the foreign principal, a contract by which the foreign principal is bound excludes the application of such custom, which is inconsistent with it.

It was urged that the rule of law was correctly stated in two propositions in the notes to *Thomson* v. *Davenport* (3): "(1.) That where A. contracts with B. without stating himself to be an agent, B. may, on discovering his principal, elect between them." "(2.) That the rule is the same where he states himself to be an agent, but does not name his principal." The following qualification, however, is added: "In these two rules it is assumed that the form of the contract is such as to render the agent at all events personally liable on it as a party." I have already pointed out that in the present case, according to the true construction of the contract, the agent does not purport himself to contract at all. The contracting party is solely his principal.

Assuming the continued existence of the custom referred to by the plaintiffs, the present contract is inconsistent with it and therefore excludes it. In my opinion the foreign principals are alone

(1) 1 Ex. D. 357.
(2) 18 Q. B. D. 708, 712, 713.
(3) 2 Sm. L. C., 12th ed., pp. 367, 368.

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liable to the plaintiffs, and the latter have not any cause of action against the defendants on these contracts.

The appeal should be allowed and judgment entered for the defendants.

BANKES L.J. read the following judgment:—In this action the plaintiffs sought to recover damages from the defendants in respect of certain alleged breaches of three contracts dated respectively July 28, 1914, and February 25 and 27, 1915, which the defendants had signed as agents for unnamed principals who resided and carried on business abroad. The only point in the case was whether the defendants were personally liable upon the contracts. Avory J., by whom the action was tried without a jury, held that the defendants were liable. From his judgment the defendants appeal.

There being no custom applicable to the case, it is not disputed that, having regard to the form of the contracts, the defendants would not have been personally liable upon them had not their principals been a foreign firm. It is said, however, that the fact that the defendants' principals were foreign principals makes all the difference, and reliance was placed upon the presumption, which it was urged existed in law, that where an agent contracted on behalf of an undisclosed foreign principal he made himself personally liable upon the contract. We have heard an interesting argument upon this question. The case for the respondents was put in this way. It was said that the difference between the case of an agent contracting for an undisclosed principal resident in this country and for an undisclosed principal resident abroad is that in the former case it is necessary to prove a custom establishing the liability of the agent, but in the latter case a custom rendering the agent personally liable upon the contract has been so well established that it is taken judicial notice of, and is spoken of as a presumption of law which must be rebutted if the agent desires to escape liability.

It is necessary to look a little closely into the cases which have been cited to see how far they establish the propositions which were founded upon them. Mr. Greer relied mainly upon *Humfrey* v. *Dale* (1) and *Fleet* v. *Murton* (2). In each of those cases the defendants entered into contracts as brokers for undisclosed principals.

(1) 7 E. & B. 266; E. B. & E. 1004. (2) L. R. 7 Q. B. 126.

Upon the face of the contracts there was nothing to render the defendants liable upon them. In each case it was sought to establish a custom of the trade by which the defendants were held liable, not having disclosed their principals. In each case it was held that the evidence of the custom was admissible, and in each case the custom was established and the defendants held liable. In each case evidence of the custom was objected to upon the ground that it contradicted the written contract, but the objection was overruled. In each case the custom which it was sought to give evidence of was a custom which rendered the agent liable as well as his principal, and not a custom which rendered him liable in the place of his principal. This, as I shall point out later, is a very material fact to bear in mind when considering what the authorities really do decide. Vaughan Williams L.J. in *In re North Western Rubber Co. and Hüttenbach & Co.* (1) deals with the grounds upon which the evidence in the case of *Humfrey* v. *Dale* (2) was admissible, and he adopts the language of Jessel M.R. in *Southwell* v. *Bowditch* (3) as giving the true explanation of the grounds upon which the evidence in that case was properly held not to contradict the written contract. It is not material for my present purpose to discuss these reasons. The next case to which it is necessary to refer is the case of *Pike* v. *Ongley*. (4) In that case evidence of a custom rendering the broker liable upon the contract was admitted upon the same grounds as were relied on in the cases to which I have already referred, but the judges both in the Court below and in the Court of Appeal drew attention to the distinction which must necessarily be drawn between a custom which renders the broker liable as well as his principal and a custom which renders the broker liable to the exclusion of his principal. Such a custom as the latter, Lord Esher points out, would be in direct contradiction of the terms of the written contract. Fry L.J. puts the point in these words : " By the terms of the document itself the owner is liable ; the custom says the broker shall be liable also ; there is nothing in that which is inconsistent with the contract, though it would be inconsistent if the custom were to

(1) [1908] 2 K. B. 907, 914.

(2) 7 E. & B. 266; E. B. & E. 1004.

(3) 1 C. P. D. 374. The citations by Vaughan Williams L.J. from the judgment of Jessel M.R. are from 45 L. J. (Q.B.) 631.

(4) 18 Q. B. D. 708, 712, 713.

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exclude the liability of the owner." So much for the law as applicable to a custom rendering a broker or agent liable where he has entered into a contract for an undisclosed principal who is resident in this country.

I come now to consider the case of an agent who has contracted on behalf of a foreign principal. The principle upon which the so-called presumption rests must, I think, be that a custom of merchants applicable to such a case has been so long and so universally recognized that it has passed into what has not very accurately been called a presumption of law. This is the ground upon which Wright J. puts the matter in *Montgomerie* v. *United Kingdom Mutual Steamship Association* (1), where, in dealing with the law applicable to the responsibility of an agent upon a contract made by him as agent, he says: "Another exception is that by usage, which is treated as forming part of the contract or of the law merchant, where there is a foreign principal, generally speaking the agent in England is the party to the contract and not the foreign principal." Blackburn J. was, I think, taking the same view when in *Armstrong* v. *Stokes* (2) he speaks of the settled rule "that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them (the goods) by his order and on his account" as a rule which "was originally (and in strictness still is) a question of fact," but one which "we are justified in treating as a matter of law." Mr. Greer contends that this custom, or usage, or rule, by whichever name it is called, is one which, like the custom in the cases to which I have already referred, renders the agent liable upon the contract in addition to the principal. In my opinion this contention cannot be maintained. The authorities from *Thomson* v. *Davenport* (3) in the year 1829 downwards are conclusive on this point. In *Thomson* v. *Davenport* (3) Lord Tenterden states the custom thus (4): "According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner." The ground upon which the custom rests is stated to be the inconvenience which would result if it was to be assumed that the

(1) [1891] 1 Q. B. 370, 372.
(2) L. R. 7 Q. B. 605.
(3) 9 B. & C. 78.
(4) Ibid. 87.

foreign principal could ever have intended the agent to pledge his (the foreign principal's) credit: see *Armstrong* v. *Stokes* (1); *Elbinger Actien-Gesellschaft* v. *Claye* (2); *Hutton* v. *Bulloch*. (3) If this be the foundation of the rule, it follows that Mr. Greer's contention on this point must fail.

The only argument remaining open to the respondents, therefore, is that, even assuming the rule to be what I have stated, namely, that in the absence of circumstances showing the contrary the agent alone is liable upon the contract made by him as agent for a foreign principal, and that the latter is under no liability at all, the rule is applicable to this case. Having regard to the form of the contracts in the present case, I do not think that this argument can prevail. The contracts are in a very special form. They do not purport to be contracts by the appellants as agents. The form in which the contracts are made is this: "Contract by which our principals sell through the agency of Smith & Tyrer, Ltd., wood brokers," and they are signed "By authority of our principals, Smith & Tyrer, Ltd., as agents." So far as the form of the contract is concerned, it states plainly that the undisclosed principals are parties to the contract, and it also states on the face of it that they are made parties by their authority. To admit evidence of a custom which would change the whole character of the contract, and substitute the appellants for the undisclosed principals as parties to it, is to flatly and manifestly contradict the document. On the grounds indicated by Fry L.J. in *Pike* v. *Ongley* (4), to which I have already referred, I am of opinion that the so-called presumption has no application to this case and cannot be relied on. Mr. Greer has argued that there is nothing special in the form of the contracts in the present case, and he relies on the language of Blackburn J. in *Fleet* v. *Murton* (5), where he says that where a contract in terms says "Sold to my principals," and the broker signs simply as broker, he does not make himself by that either purchaser or seller of the goods. Mr. Greer contends that in substance the contracts in the present case are identical with the contract outlined by Blackburn J., and that there was no reason, therefore, why the presumption should not be

(1) L. R. 7 Q. B. 598, 605.
(2) L. R. 8 Q. B. 313.
(3) (1873) L. R. 8 Q. B. 331; (1874) L. R. 9 Q. B. 572.
(4) 18 Q. B. D. 713.
(5) L. R. 7 Q. B. 131.

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applied so as to render the appellants alone liable on the contracts. There is, in my opinion, this essential difference, namely, that where the form of contract is that outlined by Blackburn J. it has been held admissible to give evidence of a custom rendering the agent liable in addition to the principal; whereas in the present case, where the only custom relied on is one discharging the principal, it cannot even be given in evidence. I cannot find that the presumption has ever been applied to such a case as this. In the present case Avory J. held that the appellants had in fact authority to make the contract in the form in which it was made. If the question of the foreign principals' liability upon the contracts was the one for decision, the fact that they had given the appellants the necessary authority would be very material. In the dispute between the present parties it is only indirectly material. If the question is looked at from the point of view of the respondents, as was done by Blackburn J. in *Elbinger Actien-Gesellschaft* v. *Claye* (1), I think that the answer must be that, having regard to the form of the contract, the respondents cannot be heard to say that they relied on the usage, because the contract in terms tells them that the only party to it is the foreign principal, and that he has been made the principal by his own authority. The respondents did not question the latter statement at the time, and I cannot see any ground upon which they can do so now. The statement negatives the assumption upon which the rule or custom rests, and I think that this appeal succeeds, and that judgment should be entered for the defendants.

BRAY J. read the following judgment:—This was an action brought by the plaintiffs, the respondents in this appeal, against the defendants to recover damages for breaches of three contracts in writing dated July 28, 1914, February 25, 1915, and February 27, 1915, under which it was alleged that the defendants had agreed to sell to the plaintiffs certain lumber c.i.f. Cape Town, South Africa. It was alleged by the plaintiffs and admitted by the defendants for the purpose of the trial that there had been no deliveries under the contracts, and the question was whether the defendants were liable under the contracts for those breaches. The case was tried before

(1) L. R. 8 Q. B. 317.

Avory J. without a jury, at Liverpool, on November 8, 1916, when judgment was given for the plaintiffs, and it was against this judgment that this appeal was brought by the defendants.

The facts as found by the learned judge or admitted were as follows: The contracts were made as the result of negotiations between the plaintiffs and defendants. The defendants were acting on behalf of Messrs. E. Sondheimer, of Memphis, U.S.A., and the defendants had authority from that firm to enter into these contracts and to pledge their credit, but they did not before or at the time of the making of the contracts disclose to the plaintiffs the names of their principals. It is to be observed that the foreign merchants were selling, not buying. No evidence was given of any custom. The contracts were all in the same form. The material clauses have been stated by Swinfen Eady L.J., and I need not repeat them. The whole of the contract had to be performed out of this country. On these facts the learned judge laid down the law applicable to the case in these words, quoting the judgment of Sankey J. in *Harper & Sons* v. *Keller, Bryant & Co.* (1): "'In my view the true effect of the cases is'—and I take this because it is, in my opinion, a correct summary of the decisions—'that they lay down a presumption rather than a principle of law, and such presumption must not be converted into an estoppel. Where an agent in England contracts on behalf of a foreign principal, he is presumed to contract personally unless a contrary intention plainly appears from evidence contained in the document itself—*Gadd* v. *Houghton* (2), or in the surrounding circumstances—*Glover* v. *Langford.* (3) If there is no such evidence, the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such a way as to establish privity between such principal and the other party, and that he is personally liable on the contract.' It is to be observed that it is not sufficient merely to show that an agent has the authority of his principal to pledge his credit, but it must also be shown that he has the authority to pledge the credit of the foreign principal in such a way as to establish privity between the principal and the other party. 'In other words, the rule is one of evidence rather than of law, and the question to be determined is really one

(1) 84 L. J. (K.B.) 1698. (2) 1 Ex. D. 357.
(3) (1892) 8 Times L. R. 628.

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of fact and is rightly left to the jury.'" He then, after examining the terms of the contracts and the surrounding circumstances which I have mentioned, held that the presumption had not been rebutted and therefore that the defendants were liable. Mr. Langdon, for the defendants, argued before us that the learned judge was wrong on both points, that there was no such presumption, and if there was that it was rebutted by the terms of the contract.

It was contended by Mr. Greer, for the plaintiffs, that, notwithstanding that by the terms of the contracts the defendants were acting for principals, it is possible to imply a contract that the agents will accept the liability of principals. If the contract is not inconsistent with the liability of the agent, then the presumption arises from the general practice of merchants. There must be something more to contradict it than the fact that the contract shows that they were acting as agents. Mr. Greer did not contend that in the absence of a custom of the trade the agent would be liable merely because he had not disclosed the name of his principal. The authorities on that point are quite clear: see *Hutchinson* v. *Tatham* (1) and *Southwell* v. *Bowditch*. (2)

It is necessary to consider Mr. Greer's two propositions. The custom of merchants is stated by Lord Tenterden in *Thomson* v. *Davenport* (3) thus: "There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner." Bayley J. says (4): "There may be a course of trade by which the seller will be confined to the agent who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad." The contract in this case was a verbal contract. The next case is *Lennard* v. *Robinson*. (5) The question arose on demurrer to a plea. The declaration set out a charterparty between Lennard and Messrs. Robinson & Fleming, of London, merchants, and signed, "By authority of, and as agents for, Mr. A. H. Schwedersky, of Memel. Pro Robinson & Fleming, Wm. F. Malcolm, John M.

(1) L. R. 8 C. P. 482.
(2) 1 C. P. D. 374.
(3) 9 B. & C. 87.
(4) Ibid. 88.
(5) (1855) 5 E. & B. 125, 131.

Lennard." The plea stated that the alleged agreement was entered into by the defendants by authority of and for and on behalf of and as agents for Schwedersky, and not otherwise; and the said person was named to and known by the plaintiff as being the defendants' principal at the time when the agreement was made. The plea was held bad on the ground that the defendants had made themselves personally liable. Lord Campbell in his judgment said that he did not attach much weight to the fact that the alleged principal was a foreigner, no part of the agreement having to be performed in England. Coleridge J. said: "I confess I cannot quite throw that out of consideration; for it seems to me reasonable that a contracting party should require to have a party to whom he may look, and upon whom he may call for performance. Still that constitutes only one circumstance to be taken into consideration."

In *Armstrong* v. *Stokes* (1) the question was whether the principal could be sued. It was held under the circumstances of that case (the principal having already paid the agent) that he could not; but in delivering the judgment of the Court Blackburn J., after stating that the question was whether they should draw from the evidence the inference of fact that the defendants were principals, said (2): "This depends entirely on what was the real nature of the employment of J. & O. Ryder" (who had given the order for the goods in their own names) "by the defendants." Later (3) he says: "But none of these things are conclusive. The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York

(1) L. R. 7 Q. B. 598. (2) Ibid. 604.
(3) Ibid. 605.

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merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit."

In *Elbinger Actien-Gesellschaft* v. *Claye* (1) the question was whether the plaintiffs, a foreign company, could sue for breach of a contract for the supply of certain railway wheels and axles. The contract had been negotiated at S. & Co.'s office between S., one of the partners of that firm, and H., the managing director of the plaintiff company, and the defendant. The defendant signed in a diary the following entry: "Mr. Claye also offers to supply 150 sets of Russian wheels," &c., and the order was accepted by S. & Co. The jury found that the contract was with S. & Co., and not with the plaintiffs. The Court refused a rule for a new trial. Blackburn J. in the course of his judgment again repeats what he had said in *Armstrong* v. *Stokes* (2): "Yet where a foreigner has instructed English merchants to act for him I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier." It is to be observed that in all these cases (except *Lennard* v. *Robinson* (3), which was a charterparty case) the foreign merchant was the buyer, not the seller, and the words in which the custom is stated refer expressly to his being the buyer. In the case we are considering the foreign merchant is the seller, not the buyer. Further, and this is also of importance, the usage is one by which the foreign principal is not liable, the presumption being that he has given no authority to the agent to pledge his credit. The agent is alone liable.

The next case is, in my opinion, a most important one—*Gadd* v. *Houghton* (4), which was decided in the year 1876. There the contract was contained in a letter from the defendants to the plaintiff in these terms: "We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges," and was

(1) L. R. 8 Q. B. 313, 317.
(2) L. R. 7 Q. B. 605.
(3) 5 E. & B. 125.
(4) 1 Ex. D. 357, 359.

signed " J. C. Houghton & Co.," without qualification. The Court of Exchequer decided in favour of the plaintiff, and the defendants appealed. The Court of Appeal, consisting of five judges, unanimously reversed that decision, and held that the defendants were not liable on the ground that the words " on account of " were not at all ambiguous. James L.J. said : " When a man says that he is making a contract ' on account of ' some one else, it seems to me that he uses the very strongest terms the English language affords to shew that he is not binding himself, but is binding his principal." The case was argued by Mr. Benjamin, Q.C., on one side and Mr. Herschell Q.C., on the other, and one of the arguments of the latter was : " When, as here, the principal is a foreigner, residing abroad, the presumption is, to say the least, stronger that it is intended to make the agent responsible." *Thomson* v. *Davenport* (1), *Lennard* v. *Robinson* (2), and Story on Agency, 7th ed., ss. 268, 290, 400, were cited. *Armstrong* v. *Stokes* (3) was not referred to, nor was any reference made in the judgments to the usage of merchants as stated by Blackburn J. in that case. In this case the foreign merchant was the seller. This may be the reason why *Armstrong* v. *Stokes* (3) was not cited and was not referred to in the judgments. This case has been acted upon ever since.

The next case is that of *Glover* v. *Langford* (4) in 1892. In that case the defendant was acting for foreign principals named in the bought note. The bought note was in these terms : J. B. R. Langford. Bought by Messrs. C. H. Glover & Co. of Messrs. John E. Young & Co., of Riga, through the agency of J. B. R. Langford, &c. This note was enclosed in a letter signed by Langford and beginning " My Riga shippers will supply," &c. Many cases were cited, including *Armstrong* v. *Stokes* (3) and *Elbinger Actien-Gesellschaft* v. *Claye* (5), and it was argued on the authority of those cases that the defendant was liable. Charles J. in giving judgment says : " In referring to the other cases it appears that in point of law there is no distinction as to the liability of an agent acting on behalf of an English or a foreign principal, it is always a question of fact, and, no doubt, the circumstance that an Englishman is acting for

(1) 9 B. & C. 78.
(2) 5 E. & B. 125.
(3) L. R. 7 Q. B. 598.
(4) 8 Times L. R. 628, 629.
(5) L. R. 8 Q. B. 313.

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a foreigner is a circumstance of great weight. . . . . Under all the circumstances I have come to the conclusion that Langford is not liable, and I do not think the mere circumstance that he had a foreign principal is enough to make him liable." In this case the foreign merchant was the seller.

The last case is the case of *Harper & Sons* v. *Keller, Bryant & Co.* (1), quoted by Avory J. in his judgment, in which Sankey J. held that " where an agent in England contracts on behalf of a foreign principal, he is presumed to contract personally unless a contrary intention plainly appears from evidence contained in the document itself—*Gadd* v. *Houghton* (2)—or in the surrounding circumstances—*Glover* v. *Langford.* (3)" Sankey J. also relied on a passage in Smith's Leading Cases, 12th ed., vol. 2, pp. 399, 400 : " A question is sometimes raised as to the legal position of an agent contracting on behalf of a foreign principal. . . . . It is conceived, however, that there is no difference in point of law between the case of an agent contracting on behalf of an English or foreign principal. In each case it is a question as to the intention of the parties to be collected from the facts, and the circumstance of the principal being foreign may be sometimes considered as of great weight in the determination of that question." The law there stated is in accordance with the judgment of Charles J. in *Glover* v. *Langford.* (3) Many years have elapsed since Blackburn J. stated that there was this usage. Trade has changed greatly and has increased enormously. My experience at the Bar and on the Bench in the Commercial Court leads me to doubt whether this usage still exists. British firms and companies do not hesitate to make contracts with foreign firms and companies, whether negotiated or not through British agents. British agents are loth to make themselves personally responsible for their foreign principals. Anything in the shape of a del credere commission is rare. But however that may be, according to the terms of the usage it seems only to apply when the foreign principal is buying. To apply it to such contracts as those which we are considering would be contrary to *Gadd* v. *Houghton* (2) and *Glover* v. *Langford* (3), as well as to the passage I have quoted from Smith's Leading Cases. In my opinion the true

(1) 84 L. J. (K.B.) 1696, 1698. (2) 1 Ex. D. 357, 359.
(3) 8 Times L. R. 628, 629.

view is, whether the foreign principal is a buyer or a seller, that the facts that the principal is a foreigner and that the agent has not disclosed his name are, as Coleridge J. said in *Lennard* v. *Robinson* (1), circumstances to be considered, and when the facts are doubtful or, in the case of a verbal contract, in dispute, or when there is a written contract the terms of which are ambiguous, they are of some importance; but when there is a written contract the terms of which are unambiguous they are of no importance, and it is not true to say that there is a presumption of fact or law that the agent for the foreign principal is personally liable.

This brings me to the consideration of the terms of these contracts in order to see whether such usage, if it exists, is consistent with their terms, or whether they rebut the presumption, if it exists. It seems to me quite clear from the terms that the foreign principal is the seller. The contract is stated to be one by which "our principals" sell through the agency of Smith & Tyrer, Limited, wood brokers, Liverpool, and Messrs. Miller, Gibb & Co., of Liverpool, buy. Then follow clauses in which reference is made to the seller and the buyer, and the arbitration clause provides that the parties expressly agree to submit all disputes to arbitration in England, and in the case of any action it is to be brought in England; and lastly there is the signature, "By authority of our principals, Smith & Tyrer, Ltd., Chas. T. Tyrer, managing director, as agents." It seems to me difficult for the parties to have used clearer words to show that the principals were to be liable and the agents were not to be liable—words at least as strong as, if not stronger than, the words in *Gadd* v. *Houghton* (2) and *Glover* v. *Langford*. (3) The agents were not professing to contract at all, the principals were; and the agents state expressly that they have authority from their principals to sign the contract. The usage by which the principal is not to be liable and the agent is to be liable is, in my opinion, excluded by the express and unambiguous terms of the contracts, and the presumption, if it exists, is completely rebutted. Mr. Greer referred us to *Humfrey* v. *Dale* (4) and *Fleet* v. *Murton* (5), where it was held that a custom of the trade by which agents were liable

(1) 5 E. & B. 131.
(2) 1 Ex. D. 357.
(3) 8 Times L. R. 628.
(4) 7 E. & B. 266; E. B. & E. 1004.
(5) L. R. 7 Q. B. 126.

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was not inconsistent with the terms of the contracts and could be read into them. It is sufficient to say that the terms of the contracts and the facts in those cases make them clearly distinguishable.

In my opinion the defendants were not liable on these contracts, and the appeal should be allowed and judgment entered for the defendants.

Appeal allowed.

Solicitors for plaintiffs: *Rawle, Johnstone & Co., for Laces & Co., Liverpool.*

Solicitors for defendants: *Alfred Bright & Sons, for Batesons, Warr, & Wimshurst, Liverpool.*

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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

SALES AGENCY, LIMITED *v.* ELITE THEATRES. ROSE, CLAIMANT.

Bill of Sale—Absolute Bill—"Apparent possession" of Grantor—Seizure of Chattels in Execution within Seven Days of making of Bill of Sale—Bill not registered—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

An absolute bill of sale, within the Bills of Sale Act, 1878, was made on May 15, 1915, and on May 18 the chattels comprised therein were seized in execution by the sheriff. The bill of sale was not registered at any time. The county court judge found as a fact that the chattels were in the apparent possession of the grantor of the bill of sale.

On appeal to the Divisional Court it was contended (the point had not been taken in the county court) that the seizure of the chattels in execution prevented them being in the apparent possession of the grantor of the bill of sale, and that, under s. 8 of the Bills of Sale Act, 1878, inasmuch as the execution was put in before the expiration of the seven days allowed for registration, the bill of sale, though unregistered, was not void as against the execution creditor. The Divisional Court held that, notwithstanding the execution, the chattels comprised in the bill of sale

were in the apparent possession of the grantor, and the bill of sale, being unregistered, was void against the execution creditor:—

Held by the Court of Appeal, that the point, not having been raised in the county court, could not be taken on appeal, but there being evidence on which the county court judge could find as a fact that the chattels were in the apparent possession of the grantor, his finding could not be disturbed.

APPEAL from the Brighton County Court.

In 1915 the plaintiffs had obtained judgment for 104*l.* against the Elite Theatres, which was the name under which G. Bloch carried on business as the proprietor of theatres. By an agreement in writing dated May 15, 1916, the business, together with certain chattels, was sold and transferred by Bloch to the claimant Rose. On May 18 the chattels comprised in the agreement were seized under an execution issued upon the judgment which had been obtained by the plaintiffs. Rose claimed the chattels, and an interpleader issue was directed to be tried between him and the execution creditors. The above agreement was a bill of sale within the Bills of Sale Act, 1878, but was held by the county court judge and the Divisional Court not to be a bill of sale within the Bills of Sale Act, 1882; it was not at any time registered under the Act of 1878. The execution creditors contended that the agreement was fraudulent and void under the statute 13 Eliz. c. 5; that it was a bill of sale within the Bills of Sale Act, 1882, and therefore void; and that the chattels were in the "apparent possession" of Bloch, and the bill of sale, not having been registered, was therefore void as against them in respect of those chattels under s. 8 of the Bills of Sale Act, 1878. (1)

(1) 41 & 42 Vict. c. 31, s. 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose

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The county court judge decided that the chattels were in the apparent possession of Bloch, and that the bill of sale, being unregistered, was void as against the execution creditors in respect of those chattels, and gave judgment in their favour. The claimant appealed.

Horton Smith, for the appellant. The goods in question were not in the apparent possession of the execution debtor, the grantor of the bill of sale. Immediately the sheriff seized the goods in execution the whole possession passed to him; the goods became in custodia legis and were no longer in the apparent possession of the execution debtor: *Ex parte Saffery* (1); *In re Eales.* (2) The effect of s. 8 of the Bills of Sale Act, 1878, is that the bill of sale is good without registration for seven days after it is made, and cannot become an unregistered bill of sale until the eighth day, and until that day the doctrine of apparent possession can have no application. Therefore, if the execution creditor seizes the goods before the seven days have expired he seizes goods which are not in the "apparent possession" of the grantor of the bill of sale. Sect. 8 requires that the apparent possession shall remain in the grantor until after the expiration of the seven days in order that the goods comprised in the bill of sale may become available for the execution creditor.

H. L. Tebbs, for the respondents. If the contention on behalf of the claimant were upheld, the result would be that a judgment creditor could not effectively seize in execution goods in the apparent possession of the grantor of a bill of sale until the expiration of the seven days. That cannot be right. The intention of the Legislature in s. 8 is that the grantee of a bill of sale shall have seven days within

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behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be)."

(1) (1881) 16 Ch. D. 668, 670, 671.

(2) (1905) 54 W. R. 202.

which to register, and that if he does so register he shall be protected; but that if he does not register within that time, the title of the execution creditor shall prevail; the fact that the execution creditor has seized in execution within the seven days does not prejudice the right of the grantee to register the bill of sale. The seizure in execution by the sheriff did not prevent the goods remaining in the apparent possession of the grantor of the bill of sale, and the county court judge has found as a fact that they were in his apparent possession. This point was not taken in the county court and ought not to be allowed to be raised now. [He also contended that the agreement was fraudulent and void under statute 13 Eliz. c. 5; and that it was a bill of sale within the Bills of Sale Act, 1882, and void under that Act.]

Horton Smith replied.

RIDLEY J. The judgment of the county court judge must be affirmed. [His Lordship then stated the facts, and said that the decision that the agreement was not fraudulent and void under 13 Eliz. c. 5 could not be disturbed, and proceeded:] Another point was taken that the bill of sale was void against the execution creditors because it had not been registered in accordance with the Bills of Sale Act, 1878, and a point has been raised which, as far as I know, has never been raised before upon s. 8 of the Act. It appears that the chattels were seized in execution before the seven days had elapsed during which the grantee could register the bill of sale under s. 8, and it was argued that therefore the Act did not apply and no objection could be taken upon the ground that the bill had not been registered. Counsel for the claimant in arguing this point relied upon the case of *Ex parte Saffery* (1), and said that the chattels ceased to be in the apparent possession of the execution debtor as soon as they got into the possession of the execution creditor, that is, as soon as they were seized in execution, because any one who went to the premises could see that they were in the possession of the execution creditor, and therefore not in the apparent possession of the execution debtor; and that therefore s. 8 of the Act of 1878 had no application. I think that the answer to that argument is that the case of *Ex parte Saffery* (1) has no

(1) 16 Ch. D. 668, 670, 671.

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application to a case of this kind. The head-note to the report of that case is as follows: "If the goods comprised in an unregistered bill of sale are, at the time of the filing of a bankruptcy petition against the grantor, in the actual visible possession of the sheriff under an execution, issued either by the grantee or by a third person, they are not, even though the grantee has himself taken no possession, in the 'apparent possession' of the grantor, and the Bills of Sale Act does not apply." Now that case was decided upon the question whose were the goods at the time of the filing of the bankruptcy petition, and upon that simple question of fact the Court came to the conclusion that they had ceased to be in the apparent possession of the grantor because the sheriff had openly and plainly taken possession of them. Jessel M.R. said: "The only person who was allowed by the sheriff to remove the goods was the execution creditor. The bankrupt was not there, and he had nothing to do with the goods. It is said that his name with that of another person was on the door of the workshop. But that alone is not enough to make the apparent possession his. The question is whether any person who went there would conclude that the bankrupt was in the sole possession of the goods, and it appears to me that he would not"; and Lush L.J. said this: "If the sheriff's officer took possession in the disguise of a livery servant of the grantor, of course that would not do."

In the present case the question is whether the execution creditor or the grantee of the bill of sale has the better position under s. 8 of the Act of 1878, for I think that the Act of 1882 does not apply to this bill of sale. Does s. 8 give these chattels to the execution creditor because the bill of sale was not registered? I will read those parts of s. 8 which bear upon this matter. [His Lordship read the material parts of the section.] It seems to me that if, as in the present case, the execution creditor takes possession before the expiration of the seven days allowed for registration, yet as against him the bill of sale must be registered. I think that the grantee of the bill of sale still has the seven days within which he can register, but that if he wishes his title to prevail against the execution creditor he must register within that time; and that until the expiration of the seven days the execution creditor cannot say that the goods are his because the bill of sale has not been

registered. I think that is the only way to read this statute properly. This bill of sale in point of fact has never been registered at all. In these circumstances it seems to me that there is good ground for saying that this bill of sale was void as against the execution creditor because it was not registered in accordance with s. 8—that is, it is void in respect of the chattels comprised therein which are in the apparent possession of the grantor. It is a question of fact whether the chattels are or are not in the apparent possession of the grantor. The learned county court judge seems to me to have properly applied the principle stated in *Ex parte Saffery* (1), that there must be something done which in the eyes of every one who sees the goods or is concerned in the matter plainly takes them out of the apparent possession of the debtor, and upon the facts he decided that the goods taken in execution were still in the apparent possession of the execution debtor. I think, therefore, that decision was right and must be affirmed.

AVORY J. I am of the same opinion, but as the main point that has been argued is a novel one which has never before been the subject of judicial decision, I will add my own reasons. [After stating the facts and deciding that the agreement was not a bill of sale within the Act of 1882, and that the decision that it was not fraudulent and void under 13 Eliz. c. 5 could not be disturbed, the learned judge continued :]

Upon the third point, upon which the main argument in this case has turned, the appellant contends that, assuming the bill of sale to be one under the Act of 1878, it was not void as regards the goods under s. 8 of that statute, because on May 18, when and as soon as the sheriff took possession, he was in actual possession and in apparent possession, and that, therefore, from that moment the grantor of the bill of sale cannot be said to have been in apparent possession. Having regard to the decisions in *Ex parte Saffery* (1) and *In re Eales* (2), the point undoubtedly is a difficult one. Those cases decided that the sheriff as soon as he is in possession is the only person who can be deemed to be either in possession or in apparent possession, and then s. 8 provides that the bill of sale is to " be deemed fraudulent and void so far as regards the property

(1) 16 Ch. D. 668. (2) 54 W. R. 202.

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in, or right to the possession of any chattels comprised in such bill of sale, which at or after the time of filing the petition for bankruptcy" are in the possession or apparent possession of the person making the bill of sale; and the Court there held, seeing that the goods were in the possession of the sheriff at the time of the filing of the petition for bankruptcy, that they were not in the apparent possession of the bankrupt or debtor, and therefore s. 8 did not apply.

The appellant contends that that doctrine is to be extended now to the whole of the seven days after the execution of the bill of sale within which the grantee has the right to register. Now it appears to me that there are two words in this section which make it impossible to adopt that argument. These words are which at "or after" the time of executing such process are in the possession or apparent possession of the grantor. If the appellant's argument is right, the goods never can be in the possession or apparent possession of the grantor *after* the execution of the process, because the sheriff, by his argument, is in possession as soon as he executes the process, and until the sheriff goes out, therefore, these words "or after" could have no application. Then the section proceeds: "and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale." It appears to me that the decisions to which I have already referred have no application to this point, because the Court had not then in mind the question about the seven days within which registration might be effected, and in my opinion a grantor may, for the purpose of this section, be in apparent possession of goods although the sheriff in fact has executed the process.

Mr. Horton Smith has contended before us that there was no evidence before the county court judge upon which he could find that the grantor was in apparent possession of these goods, and that the county court judge misdirected himself. It appears, however, that the county court judge has applied the test as laid down by the Court of Appeal; he said that there must be something done which in the eyes of everybody who sees the goods or who is concerned in the matter plainly takes them out of the apparent possession of the debtor. That is a question of fact, and there was evidence either way; and he found as a fact that these goods were

at the time in the apparent possession of the grantor. This point which has been taken here that the goods could not be in the apparent possession of the grantor because the sheriff was in fact in possession was not argued before the learned county court judge; but I think Mr. Horton Smith was within his rights in urging as a branch of his argument that s. 8 did not apply to the case.

For the reasons I have given I think the county court judge was right in coming to the conclusion that s. 8 did apply, and that the title of the claimant was not proved. This appeal must therefore be dismissed.

Appeal dismissed; leave to appeal.

J. H. W.

The claimant appealed.

1917. March 30. *Horton Smith*, for the appellant. Under s. 8 of the Bills of Sale Act, 1878, the grantee of a bill of sale has seven days during which he may register it, and during those days his title is good against the world. The execution creditor having seized the goods before the expiration of the seven days, they are no longer in the apparent possession of the grantor, and s. 8 does not therefore apply.

As soon as the sheriff seizes the goods they are in custodia legis, and the question of apparent possession is immaterial. The execution creditor must prove that the goods were in the apparent possession of Bloch, not only at the time of the execution of the assignment, but after the expiration of the seven days. Under the Act the grantee has a good title during the seven days. The absolute title is only displaced by the Act in the events therein prescribed: *Ex parte Saffery* (1); *In re Eales* (2); *Marples* v. *Hartley*. (3)

[*Powell, K.C.*, for the respondent. That point was not taken before the county court judge and cannot be raised on appeal: *Smith* v. *Baker & Sons*. (4)

LORD COZENS-HARDY M.R. We are bound by that decision.]

Secondly, I submit that there was no evidence upon which the county court judge could find that the goods were in the apparent

(1) 16 Ch. D. 668.
(2) 54 W. R. 202.
(3) (1861) 30 L. J. (Q.B.) 92.
(4) [1891] A. C. 325, 333.

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possession of Bloch. He misdirected himself in coming to that conclusion: *Gough* v. *Everard* (1); *Ex parte Hooman* (2); *Ex parte Lewis* (3); *Ex parte Jay*. (4)

Powell, *K.C.*, and *Tebbs*, for the respondent, were not called upon to argue.

LORD COZENS-HARDY M.R. The only part of the appellant's intended argument actually made is that relating to apparent possession, and that, as Martin B. said in *Gough* v. *Everard* (1), is really a question of fact. Now was there any evidence in this case to justify the finding of the county court judge? The facts are these. Bloch was the owner of the licence, and his trade name, the Elite Theatres, was put up outside the premises, and the chattels therein belonged to him. Then a bill of sale was made which might have passed the property but for the operation of the Bills of Sale Act, 1878. What happened after that? There was no change in the name outside the premises, or in the ownership of the licence, or in the management by Rose. There was nothing to indicate that Rose was in possession of the goods as against Bloch. It is impossible to say that there was no evidence to justify the county court judge in finding as he did. There is no authority for holding that he came to a wrong decision. The county court judge referred to a statement of Mellish L.J. in *Ex parte Jay* (5): "There must be something done which takes them plainly out of the apparent possession of the debtor in the eyes of everybody who sees them." That case arose under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 7, but there is no substantial difference in the two sections. The county court judge said that he thought this case was precisely within the language of Mellish L.J., and it is argued that he was wrong in that; but even if he were, the county court judge has found as a fact that the goods were in the apparent possession of the debtor. For these reasons I hold that the appeal fails.

WARRINGTON L.J. I agree.

(1) (1863) 32 L. J. (Ex.) 210; 2 H. & C. 1.
(2) (1870) L. R. 10 Eq. 63.
(3) (1871) L. R. 6 Ch. 626.
(4) (1874) L. R. 9 Ch. 697.
(5) L. R 9 Ch. 697, 704.

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SCRUTTON L.J. I agree. Counsel for the appellant tried to address to us two arguments which he unsuccessfully addressed to the Divisional Court—that is to say, that a bill of sale is good without registration for seven days, and that the chattels were not in the apparent possession of the debtor, the sheriff having taken them in execution. The trouble is that those arguments were not addressed to the county court judge, and the Court of Appeal ought not to hear arguments on points of law which have not been addressed to the county court judge, as was decided in the case of *Smith* v. *Baker & Sons.* (1) With regard to the rest of the case I agree with the Master of the Rolls.

Appeal dismissed.

Solicitors for appellant: *Sawyer & Withall, for J. C. Buckwell & Webb, Brighton.*

Solicitors for respondents: *F. O. Chinner & Co.*

G. A. S.

PRITCHARD *v.* PETO AND OTHERS.

[1916 P. 731.]

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March 27; *April* 3.

Negligence—Defect in Roof of House—Loose Cornice—Liability of Owner and Occupier—Injury to Invitee through Fall of Cornice.

The plaintiff went to a house owned and occupied by one of the defendants, a married woman, to collect money due to him from her. While he was standing upon the doorstep a piece of a projecting cornice from the top of the house fell on his head and injured him. The house was in apparently good repair, and the defendant did not know of the defect in the cornice. The defect, which was an old one, was due to the action of the weather upon the cement. In an action brought by the plaintiff against the defendant to recover damages for the injuries he had suffered:—

Held, that the plaintiff was not entitled to recover, inasmuch as the defendant's duty was to take reasonable care to keep the house in such a state of repair as not to expose the plaintiff to any hidden danger of which the defendant was aware, or ought to have been

(1) [1891] A. C. 325.

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aware; and the plaintiff had not shown that she was aware, or ought to have been aware, of the decay of the cornice.

Indermaur v. *Dames* (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311 followed.

Tarry v. *Ashton* (1876) 1 Q. B. D. 314 distinguished.

FURTHER CONSIDERATION in an action tried before Bailhache J. and a common jury.

The action was brought to recover damages from the defendant Mrs. Peto for injuries sustained by the plaintiff by reason of the negligence of the defendant. The plaintiff in the alternative claimed damages from the defendants the Electrical Contracts and Maintenance Company, Limited, for injuries sustained by him through their negligence.

The following statement of the facts is taken from the judgment of the learned judge :—

"The plaintiff, a newsvendor, went on Sunday, April 16, 1916, to a house, 37, Packington Street, Islington, owned and occupied by the defendant Mrs. Peto, to collect the money due to him for papers delivered to her during the week. Sunday was his regular day for collecting these accounts. He went up the steps, and while standing at the door a piece of a projecting cornice from the top of the house fell on his head and injured him. For the injuries so sustained he brought this action, alleging that Mrs. Peto was negligent in allowing the cornice to be in an unsafe and dangerous condition, so that a part of the cornice fell upon the plaintiff's head whilst he was lawfully on Mrs. Peto's premises. It is to be observed that the plaintiff's errand to the house brought him within that class of persons known to the law as 'invitees,' and further that the misfortune befel him while he was on Mrs. Peto's premises and not upon the highway.

"It was admitted by the plaintiff that the house was in apparently good repair and that Mrs. Peto did not know of the defect in the cornice. She bought the house of the then owner four years ago, and it had been done up about three to four years before the accident. The defect in the cornice, which was an old one, was due to the action of the weather upon the cement."

The negligence which the plaintiff charged against the defendant Mrs. Peto was that she allowed the cornice to be in an unsafe and

dangerous condition. As against the defendants the Electrical Contracts and Maintenance Company, Limited, he alleged that they so carelessly and unskilfully fixed a telephone wire to the front of the house that a part of the cornice became loose and was dangerous to persons lawfully using the premises and fell.

By agreement between the parties the jury assessed the damages to which the plaintiff would be entitled as against the Electrical Contracts and Maintenance Company, Limited, in the event of their liability to him being established, and any further question of fact or law was left to the learned judge, who with the consent of the parties referred the question of the condition of the roof to a surveyor. The surveyor reported that there was no defect for which the Electrical Contracts and Maintenance Company were responsible, and thereupon the learned judge entered judgment for them.

J. A. Slater, for the plaintiff.

R. J. Willis, for the defendant Mrs. Peto.

Langdon, K.C., and *W. E. Lloyd* (*W. O. Hodges*, for *G. C. Rankin*, serving with His Majesty's Forces, with them), for the defendants the Electrical Contracts and Maintenance Company, Limited, did not appear on the arguments on further consideration.

The arguments sufficiently appear from the judgment.

In addition to the authorities mentioned in the judgment *Palmer* v. *Bateman* (1) was referred to.

Cur. adv. vult.

April 3. The following judgment was read by

BAILHACHE J., who, having stated the facts, continued: Upon these facts counsel for the plaintiff argued that the case was one of res ipsa loquitur, and he referred to *Byrne* v. *Boadle* (2), but he chiefly relied upon *Tarry* v. *Ashton* (3), in which the occupier of a house from which a lamp projected over the street was held liable to a passer-by injured by its fall, although the occupier had employed a competent contractor to put the lamp in repair. The Court held that it was the defendant's duty to make the lamp reasonably safe. The contractor had failed to do that; therefore the defendant had

(1) [1908] 2 I. R. 393. (2) (1863) 33 L. J. (Ex.) 13.
(3) 1 Q. B. D. 314.

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Bailhache J.

not done his duty and was liable to the plaintiff for the consequences. That was a nuisance case, and, as was said by Hamilton L.J. in *Latham* v. *Johnson* (1), those cases stand upon a different footing from cases of occupiers and invitees.

The present case is correctly pleaded as one of negligence and not of nuisance, and, in considering whether the facts support that allegation, one has first to ascertain what duty Mrs. Peto owed to the plaintiff; for unless her duty can properly be stated in terms large enough to cover this case, she can be guilty of no breach of duty towards the plaintiff.

I have come to the conclusion that the duty owed to the plaintiff was the same as the duty owed to the plaintiff in *Indermaur* v. *Dames* (2), and that, stated in terms applicable to this case, Mrs. Peto's duty was to take reasonable care to keep her house in such a state of repair as not to expose the plaintiff to any hidden danger of which she was aware, or ought to have been aware: quite a different duty from that owed by the defendant to the plaintiff in *Tarry* v. *Ashton*. (3)

Now in order to make Mrs. Peto liable, if I have correctly described her duty, it must be shown that she was aware, or ought to have been aware, of the decay of the cornice. It is admitted that she was ignorant of it. The plaintiff, if he desired to establish the fact that her ignorance was due to neglect of some reasonable precaution, should have given some evidence to show what precautions are usual and proper for occupiers of houses with projecting cornices to take, and that she failed to take them. This he made no attempt to do. I am sorry for the plaintiff. He was hurt through no fault of his, and, although he has tried to make two separate defendants liable, he has failed against both. I can only sympathize with him in his injuries and his disappointment.

Judgment for defendants.

Solicitors for plaintiff: *Watson, Sons & Room.*

Solicitors for defendant Mrs. Peto: *Lucas & Bailey.*

Solicitor for defendants the Electrical Contracts and Maintenance Company, Limited: *A. Powell.*

(1) [1913] 1 K. B. 398. (2) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(3) 1 Q. B. D. 314.

J. E. A.

GREAT WESTERN RAILWAY COMPANY *v.* DAFEN TINPLATE COMPANY.

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March 20, 21; *April* 3.

[1915 G. 1659.]

Railway — Consignment Note — Condition — Demurrage in respect of Detention of Trucks—Right of Railway Company to recover—Services rendered by Railway Company within Scope of their Undertaking—Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxxii.*), *Schedule, Part I., clause 5, sub-clause (iv.)*; *Part IV.*

The plaintiffs, the Great Western Railway Company, under consignment notes signed by the defendants, conveyed in trucks tinplates from the defendants' works near Swansea to various sheds upon the premises of the Swansea Harbour Trust, the route being partly over the plaintiffs' system and partly over the lines of the Swansea Harbour Trust. The plaintiffs did the haulage over the harbour trust lines and charged a rate for conveyance of 2*s.* 8*d.* per ton and made a charge for the haulage services of 3*d.* extra. By a condition indorsed upon the consignment notes it was provided that "after the termination of the transit, goods carried or conveyed by the company will be subject in addition to the charge for carriage to further charges for demurrage of 3*s.*" (subsequently reduced to 1*s.* 6*d.*) "per truck per day . . . . no such charges shall be made if the company have not given proper opportunity for the removal of the goods or the discharge." By a circular letter notice was given by the plaintiffs to the defendants that in the event of demurrage being incurred upon waggons loaded by the defendants, or upon sheets covering the same, and detained upon the lines of the Swansea Harbour Trust at Swansea the plaintiffs would hold the defendants responsible for the payment of such demurrage; that railway stock upon the harbour trust lines would be treated as upon a private siding, and that the defendants would be allowed four clear days exclusive of the day of arrival before demurrage became chargeable. There was never any delay in transit while the trucks were on the plaintiffs' system, but when they passed on to the lines of the Swansea Harbour Trust delays frequently arose, the delays being entirely beyond the control of and not caused by any default of the plaintiffs. In an action for demurrage:—

Held, that the contract between the parties was one whereby the plaintiffs agreed to carry partly over their own system and partly over the Swansea Harbour Trust lines; that the condition in the consignment notes only referred to events happening after the termination of the transit, and therefore did not protect the defendants against the claim for demurrage which arose during the

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transit; and further that the condition did not refer to a detention of trucks upon the lines of the Swansea Harbour Trust.

By sub-clause (iv.) of clause 5 of Part I. of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, it is provided that the company may charge a reasonable sum by way of addition to the tonnage rate for "The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof"; and by Part IV. the company might charge "For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader, and in respect of which no provisions are made by this schedule such reasonable sum as the company may think fit in each case":—

Held, that clause 5, sub-clause (iv.), of Part I. only referred to detention of trucks before or after conveyance, and therefore did not apply to the present case; but that the keeping by the plaintiffs of the defendants' goods in their trucks until the consignees, to whom on the defendants' order they were bound to deliver them, were ready to take them was a service provided and rendered by the company within the scope of their undertaking by the desire of the defendants, and that therefore the plaintiffs were also entitled to recover the demurrage under Part IV.

ACTION tried in the Commercial Court before Sankey J. without a jury.

The action was brought to recover 86*l.* 5*s.* 6*d.* as moneys due for demurrage on trucks under contracts contained in consignment notes respectively under which goods were carried from time to time by the plaintiffs for and on behalf of the defendants, and alternatively the like sum as a reasonable charge for exceptional accommodation or services rendered by the plaintiffs to the defendants as traders by their desire under Part IV. of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891.

The following statement of the facts is taken from the judgment of the learned judge:—

"In this case the Great Western Railway Company sue the defendants for a sum of 86*l.* 5*s.* 6*d.* in respect of the alleged detention of certain of the company's trucks at Swansea. They say they are entitled to the sum either under certain consignment notes and circulars which form the contract between them and the defendants,

or, alternatively, as being a reasonable charge for exceptional accommodation or services rendered by them to the defendants under and by virtue of Part IV. of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891. (1)

"The facts have been agreed between the parties, but for the purposes of my judgment may be shortly stated as follows: The plaintiffs under consignment notes signed by the defendants convey tinplates from the defendants' works at Dafen, near Swansea, to various sheds upon the premises of the Swansea Harbour Trust. The route followed is over the plaintiffs' system as far as a point known as the King's Dock Junction. From that point the trucks containing the goods have to be taken over the lines of the Swansea Harbour Trust to the sheds in question on the quay side. The plaintiffs or their agents do the haulage over the harbour trust lines and place the trucks at the sheds in a position suitable for discharging, the rate charged by them for conveyance being 2*s.* 8*d.* per ton and the charge made for the haulage services just referred to 3*d.* over and above the rate. It may be taken that as far as the present case is concerned there is never any delay in transit as

(1) Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxii.), schedule, Part I. (Maximum Rates and Charges), clause 5: "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate." . . . .

Sub-clause (iv.): "The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof; or, in cases in which the merchandise is consigned to an address other than the terminal station beyond a reasonable period from the time when notice has been delivered at such address that the merchandise has arrived at the terminal station for delivery. And services rendered in connection with such use and occupation."

Part IV. of the schedule (Exceptional Class) provides that "For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader, and in respect of which no provisions are made by this schedule," the company may charge such reasonable sum as they may think fit in each case.

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long as the trucks remain on the plaintiffs' system, but when they leave the King's Dock Junction and pass on to the lines of the Swansea Harbour Trust delays frequently arise, due either to the above-mentioned sheds being full or to other causes which prevent the trucks on arrival from being unloaded or from getting up as far as the sheds. These delays are entirely beyond the control of and are not caused by any default of the plaintiffs.

"By condition 8 of the consignment notes the defendants contracted to pay as follows: 'After the termination of the transit, goods carried or conveyed by the company will be subject, in addition to the charge for carriage, to further charges for demurrage of 3*s.* per truck per day, and 1*s.* per sheet per day in the case of traffic conveyed in railway company's trucks, and of 6*d.* per truck per day for siding rent in the case of traffic conveyed in traders' trucks, or in the case of such goods as are unloaded from the truck, to reasonable charges for rent or services performed, until they are removed from the company's premises; and similar charges will be made with respect to goods the delivery of which cannot be effected by the company in consequence of incorrect or insufficient address. Provided that no such charges shall be made if the company have not given proper opportunity for the removal of the goods or the discharge of the truck.' By circulars issued to the defendants and all other traders, dated January 1 and February 25, 1908, the plaintiffs gave notice as follows: 'That their scale of charges for demurrage in the South Wales district on waggons and sheets owned by them has been revised, and the amended scale will come into operation on the 1st of February, 1908. Particulars may be obtained on application at any of the companies' goods stations.'

"By the amended scale 1*s.* 6*d.* per truck per day was substituted for 3*s.* per day. On February 25, 1908, the following circular in the form of a letter from Mr. Trickey, representing the plaintiffs, was addressed to the defendants: 'In connection with the revised regulations in regard to the charging of demurrage on railway stock, and which came into operation on the 1st instant, I beg to inform you that in the event of demurrage being incurred upon waggons loaded by you, or upon sheets covering the same, and detained upon the lines of the Swansea Harbour Trust at Swansea,

we must hold you responsible for the payment of such demurrage, the contract for the conveyance being with you. I think it desirable to give you this intimation so that you may make timely arrangements with your agents for promptly discharging the waggons. I may add that railway stock upon the harbour trust lines will be treated as upon a private siding, and you will be allowed four clear days, exclusive of the day of arrival, before demurrage becomes chargeable.' Some controversy arose as to the effect of the circular. The learned counsel who appeared for the plaintiffs contended that it formed part of the contract, and further argued that this fact was one of those agreed in the admitted facts. The learned counsel for the defendants denied this, but all he urged was that he did not quite understand how the circular could be said to be part of the contract, or if it were, how it could make any difference. It is unfortunate that in a case of such importance there should be such a dispute, but I think the plaintiffs' contention as to the admitted facts is correct. I am also of opinion that the circular is part of the contract, for although the defendants at first protested against the charge they do not appear to have acted on the protest, but continued to consign the trucks after the circular had been brought to their notice and with full knowledge thereof. It is not disputed that the time allowed for clearing the trucks and the proposed charge of eighteen pence a day for detention is reasonable, and it has been arranged that the amount, if any, due to the plaintiffs shall be agreed between the parties on this basis."

Roche, K.C., *Schiller*, K.C., and *F. T. Barrington-Ward*, for the plaintiffs.

MacKinnon, K.C., and *W. A. Jowitt* (*Douglas Hogg* with them), for the defendants.

The arguments sufficiently appear from the judgment. The following authorities were referred to in addition to those cited in the judgment:—*Wright* v. *Midland Ry. Co.* (1), *London and North Western Ry. Co.* v. *Crooke & Co.* (2), and *Birmingham Corporation* v. *Midland Ry. Co.* (3)

Cur. adv. vult.

(1) (1873) L. R. 8 Ex. 137. (2) (1904) 20 Times L. R. 506.
(3) (1909) 26 Times L. R. 46.

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April 3. The following judgment was read by

SANKEY J., who, having stated the facts, continued: The defendants contend: (1.) That they are under no liability to pay the sum upon the ground that the transit for which the plaintiffs had contracted is from the defendants' works to the shed, and that they, the defendants, are not liable for any delay which may happen to the trucks during such transit; (2.) that the detention of trucks is provided for by clause 5, sub-clause (iv.), of Part I. of the schedule to the Great Western Order above referred to, and that consequently Part IV. of the schedule to the Order does not apply.

I now proceed to deal with these two points. As to (1.), that the defendants were not liable for delay during transit, in my view the contract between the parties is one whereby the plaintiffs agreed to carry partly over their own system and partly over the Swansea Harbour Trust lines, and one which the plaintiffs are obliged to accept. The rate of 2*s.* 8*d.* represents the rate for and incidental to conveyance only, and the charge of 3*d.* represents the charge for haulage only. It was by and in consequence of the defendants' request that the trucks had to be taken over the Swansea Harbour Trust lines, where they were detained until it was possible for them to reach and be unloaded at the sheds. Under the contract contained in the consignment note and/or the circular the defendants promised to pay to the plaintiffs the sum of 2*s.* 8*d.* for conveyance, 3*d.* for haulage, and the sum of 1*s.* 6*d.* per truck per day for detention of the plaintiffs' trucks on the lines of the Swansea Harbour Trust, if such detention exceeded four days and were not due to any act or default of the plaintiffs, it being admitted that such a sum and such a period are reasonable. It was urged that condition 8 of the consignment notes provided that no charge should be made if the plaintiffs had not given proper opportunity for the removal of the goods or the discharge of the trucks, but that condition only refers to events happening after the termination of the transit, and further does not refer, in my opinion, to a detention of trucks upon the lines of the Swansea Harbour Trust.

I am therefore of opinion that under the contract above referred to the plaintiffs are entitled to the sums claimed, but I proceed to a consideration of the second point in case it should be held that my conclusion on the first is wrong.

As to (2.), that Part IV. of the schedule to the Great Western Order does not apply, I am of opinion that clause 5, sub-clause (iv.), Part I., of the Order only refers to detention of trucks before or after conveyance, which is not the case here. In sub-clause (iv.) it is provided that the company may charge a reasonable sum by way of addition to the tonnage rate for "The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof." The detention here is detention during transit over the Swansea Harbour Trust lines, and in Part IV. of the schedule it is provided that the company may charge "For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader, and in respect of which no provisions are made by this schedule, such reasonable sum as the company may think fit in each case."

This case is analogous to the wait order sidings case (*Midland Ry. Co.* v. *Myers, Rose & Co.* (1)), and also to the crippled waggons sidings case (*London and North Western Ry. Co.* v. *Duerden* (2)). I think that the company's keeping the defendants' goods in their trucks until the consignees to whom on the defendants' order they were bound to deliver them were ready to take them is a service provided and rendered by the company within the scope of their undertaking by the desire of the defendants. It is admitted that the amount sought to be charged is reasonable, and in the result my judgment is for the plaintiffs with costs.

Solicitor for plaintiffs : *L. B. Page.*

Solicitors for defendants : *Williamson, Hill & Co., for Ingledew, Sons & Phillips, Swansea.*

(1) [1909] A. C. 13. (2) (1916) 114 L. T. 590; 85 L. J. (K.B.) 885.

J. E. A.

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March 28, 29;
April 26.

ASSOCIATED OIL CARRIERS, LIMITED *v.* UNION INSURANCE SOCIETY OF CANTON, LIMITED.

[1916 A. 1131.]

Insurance (Marine)—Freight—Abandonment of Voyage—Loss—Actual or Constructive—Notice of Abandonment—German Charterers—Material Circumstance—Non-disclosure—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 18, 62.

On July 31, 1914, a German firm, who were the charterers of the plaintiffs' ship, cabled instructions to them for the ship, which was then at Portland, to proceed to Kustendji, a Roumanian port, and to load there a cargo for the charterers. On the same day the plaintiffs, without disclosing the circumstance that the charterers were a German firm, effected an insurance against war risks with the defendants on freight per the ship at and from Portland to Kustendji and back to certain Continental or English ports. The ship started forthwith on the voyage, and on August 6 arrived at Gibraltar, where in consequence of the outbreak of war on August 4 she remained awaiting orders. On August 11, by the plaintiffs' orders, the voyage to Kustendji was abandoned and the ship proceeded to Norfolk, Virginia. In an action to recover a total loss under the policy of insurance:—

Held, that the outbreak of war having made it illegal for the plaintiffs to perform the charterparty, and there being no reasonable prospect of obtaining any other freight engagement at Kustendji, there had been an actual, not a constructive, total loss of the insured freight; and that, even if the loss were a constructive total loss, notice of abandonment was in the circumstances unnecessary.

Held, also, that, having regard to the decision of *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* [1916] 1 A. C. 650, the fact that the charterers were a German firm was on July 31, 1914, material, but that, as at that date that fact, if disclosed, would not in fact have influenced the judgment of a prudent insurer, it was not a "material circumstance" within s. 18 of the Marine Insurance Act, 1906, so as to necessitate its disclosure, and the non-disclosure, therefore, did not invalidate the insurance.

ACTION in the commercial list tried by Atkin J. without a jury.

The facts as stated by the learned judge in his written judgment were as follows:—

"This is a claim by the plaintiffs, the owners of the oil tank

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steamer *Baku Standard*, against the defendants on a policy of insurance upon freight on a voyage from Portland to Kustendji in Roumania and back to continental or English ports as therein mentioned. The policy is against war risks only. The defendants say that there was no loss, or if there was, it was a constructive total loss, and that notice of abandonment was not given, or if given, not given in time ; and they further plead that the policy is void for non-disclosure of a material fact, namely, that the freight at risk was freight which would be due under a charter to a German company resident in Germany.

" The facts appear to be that by charterparty dated January 20, 1913, the plaintiffs chartered the *Baku Standard* to a German company of Berlin. The charterparty was expressed to remain in force for consecutive voyages over three years from the commencement of loading the first cargo thereunder. On July 14, 1914, the steamer was at Vlaardingen, and the plaintiffs' agents, Messrs. Jacobs & Co., were in correspondence with the German charterers to obtain information as to her next loading port. Before obtaining it they obtained an insurance on ' chartered freights ' per the steamer at and from Vlaardingen to a port or ports in the Black Sea, and thence to ports in the United Kingdom or Continent between Bordeaux and Hamburg, both inclusive. This policy did not cover war risks. The owners continued to experience difficulty in getting the charterers to name a loading port. On July 27 the charterers cabled that they declared the charter terminated in consequence of the war between Austria and Serbia rendering shipping from Roumania impossible. The owners firmly declined to accept this view of the rights of the parties, and eventually on July 31 the charterers withdrew their former cable and cabled instructions for the steamer to proceed to Kustendji immediately. The steamer had now arrived at Portland and was awaiting orders. Upon receipt of those instructions Messrs. Jacobs gave telephone instructions to Messrs. Willis Faber & Co., insurance brokers, to take out the policy in question against war risks. The policy is expressed to be, not as in the former ordinary risk policy on ' chartered freight,' but on ' freight and/or anticipated profit ' per the *Baku Standard* at and from Portland to Kustendji and back to ports in the United Kingdom and/or Continent, excluding Germany or Russia, but including any French

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port in the Mediterranean. On the same day Messrs. Jacobs wrote to Messrs. Willis Faber & Co. purporting to confirm 'having instructed you, and also your having placed on our account insurance on "chartered freight."' But on the same day Messrs. Willis Faber & Co. reported having insured 'on freight and/or anticipated profit,' and the cover note was received without demur. I have no doubt that the change of language from the former policy was intentional, and probably due to the charterers' threat on July 27 to terminate the charter. The *Baku Standard* proceeded forthwith upon her voyage. On August 4 Messrs. Jacobs cabled instructions to Lloyd's at Gibraltar to instruct the steamer to await orders on arrival there. On August 6 the steamer arrived at Gibraltar, and awaited orders. War had on August 4 broken out between England and Germany. On August 11 the owners instructed the captain to proceed to Norfolk, Virginia, for orders, and on August 13 directed him to proceed first to Las Palmas to coal and then to Norfolk. On August 15 the captain sailed in accordance with those instructions. The steamer arrived at Norfolk, and on August 19, while on her voyage there, was requisitioned by the Admiralty. I am satisfied that in taking the course they did after the outbreak of war the owners acted prudently and reasonably. Their charter was dissolved by the war; and I think it was established that at this time there was no reasonable prospect of obtaining either a charter or any freight engagement at Kustendji for the steamer. I do not think any prudent uninsured owner under the circumstances would have proceeded on the insured voyage."

Roche, K.C., and *Simey*, for the plaintiffs. Although the policy was expressed to be on freight generally on the voyage specified and not upon chartered freight, the freight which was to be earned under the charterparty with the German firm was intended to be the subject-matter of the insurance, and that freight was at risk as soon as the voyage began. After the outbreak of the war it became illegal for the plaintiffs to carry out their contract with the German charterers. It was impossible in the circumstances for the plaintiffs to earn any other freight on this voyage. There has therefore been an actual, not a constructive, total loss of freight by a peril insured against, namely, restraints of princes, and the plaintiffs are entitled

to recover: *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1); *Miller* v. *Law Accident Insurance Co.* (2)

MacKinnon, K.C., and *R. A. Wright*, for the defendants. The decision in *Sanday's Case* (1) has no application to the facts of this case. There the insurance was on goods to be carried on a particular voyage. The voyage was frustrated by a peril insured against, and consequently there was a constructive total loss of the goods. Here the insurance was not of chartered freight but of freight generally, that is, of any freight which could be earned on the voyage specified in the policy. Although it became illegal for the plaintiffs to earn freight by carrying a cargo for the German charterers, the outbreak of war did not render the voyage to Kustendji an illegal voyage. There was nothing to prevent the plaintiffs from sending the ship to Kustendji to try and obtain some other cargo. The loss, if any, was not an actual but a constructive total loss of freight: *Everth* v. *Smith* (3); *Scottish Shire Line* v. *London and Provincial Marine and General Insurance Co.* (4); *Becker, Gray & Co.* v. *London Assurance Corporation.* (5) If it was a constructive total loss, the loss cannot be recovered, because there was no notice of abandonment, or, if any, it was too late. The law with regard to a constructive total loss of freight is somewhat obscure, but there is the authority of Brett J. in *Rankin* v. *Potter* (6) for saying that there can be a constructive total loss of freight, and that "if the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight." See also Arnould on Marine Insurance, 8th ed., ss. 1161, 1163, 1168.

Lastly, the fact that the charterers were a German firm was a material circumstance within the meaning of s. 18 of the Marine Insurance Act, 1906, and should, therefore, have been disclosed to the defendants. By sub-s. 2 of s. 18 the test of materiality is whether the circumstance in question would have influenced the judgment,

(1) [1916] 1 A. C. 650.
(2) [1903] 1 K. B. 712.
(3) (1814) 2 M. & S. 278.
(4) [1912] 3 K. B. 51.
(5) [1916] 2 K. B. 156.
(6) (1873) L. R. 6 H. L. 83, 103.

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not of the particular underwriter, but of "a prudent insurer." A prudent insurer must be assumed to be familiar with the law so far as it affects his business, including the law as laid down by the House of Lords in *Sanday's Case* (1), and therefore, if the existence of the German charterers had been disclosed to him, he would have known that the outbreak of war would render this insurance illegal. [*The Parchim* (2) was also cited.]

Roche, K.C., and *Simey* in reply. There is no case to be found in the books in which a claim for a total loss of freight has failed on the ground that the loss was constructive only and that there was no notice of abandonment. It is immaterial to consider whether the reason is either that there is no such thing as a constructive total loss of freight or that notice of abandonment is unnecessary because there is nothing to abandon. In the present case the only thing which could be abandoned to the underwriters was the plaintiffs' rights under a contract the performance of which had become illegal.

[ATKIN J. That would be so if the insurance were of chartered freight.]

By s. 26, sub-s. 2, of the Marine Insurance Act, 1906, the policy must be construed to apply to the interest intended by the assured to be covered, and the evidence shows clearly that the subject-matter of the insurance was the chartered freight. But, assuming it was freight generally that was insured, at the time when it became impossible to earn the chartered freight there was no other freight which could have been earned on this voyage. Therefore there was an actual total loss. It may be, as Brett J. pointed out in *Rankin* v. *Potter* (3), that a constructive total loss of freight is not an impossibility, but the observations of that learned judge were not directed to a case like the present, where the disability is not of the ship but of the whole venture: *Green* v. *Royal Exchange Assurance Co.* (4)

As to the alleged non-disclosure of a material circumstance, the evidence shows that at the date when this insurance was effected it would never have occurred to any underwriter to inquire as to the nationality of the charterer. [*Popham* v. *St. Petersburg Insurance*

(1) [1916] 1 A. C. 650.
(2) (1915) 1 Br. & Col. P. C. 579.
(3) L. R. 6 H. L. 103.
(4) (1815) 6 Taunt. 68.

Co. (1) and *Polurrian Steamship Co.* v. *Young* (2) were also referred to.]

Cur. adv. vult.

April 26. ATKIN J. read the following judgment, which, after stating the facts as set out above, continued as follows: Upon these facts the plaintiffs contend that there has been a total loss of freight by restraint of princes, inasmuch as after August 4 it became illegal by English law for the owner to fulfil the charter made with an enemy, and they rely on the decision in *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (3) On the other hand, the defendants contend that the two cases differ. In *Sanday's Case* (3), it was said, the insurance was on cargo, and the whole adventure was frustrated. Here the insurance was on freight generally. It is true that the particular chartered freight at risk was lost; but there was nothing to prevent the steamer from proceeding on the insured voyage. If she had earned any freight after proceeding there would have been no loss: *Everth* v. *Smith* (4); and in any case the underwriters do not take upon themselves the risk of the freight market failing in consequence of war.

In my opinion the plaintiffs establish that there was a total loss by a peril insured against. I think it is true that this was a policy on freight in general terms, and was not intended to cover merely the chartered freight. I do not pause to consider whether any meaning can be attached to the words "and/or anticipated profit," though I cannot think of any insurable interest described by such words which would not be covered by the word "freight." But I think that the insurance would have covered a loss of freight, though the steamer had started on the insured voyage freed from the charter altogether. Nevertheless the insurance clearly covers the chartered freight; the risk in respect of that freight attached as soon as the vessel began the insured voyage; and the owners had an insurable interest in the chartered freight at the outbreak of war. That freight they have lost, and lost because on the outbreak of war British law forbade them to fulfil the contract of affreightment; in other words, forbade them to proceed to Kustendji for the purpose

(1) (1904) 10 Com. Cas. 31.
(2) [1915] 1 K. B. 922.
(3) [1916] 1 A. C. 650.
(4) 2 M. & S. 278.

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of loading a cargo from the charterers. It is to be noticed that they were proceeding to Kustendji solely because they were so directed by the charterers, a direction which before the war they were bound to obey, and after the war they were bound to disobey. Apart from the charter, as I have already said, on August 6 no reasonable person would have thought of making the insured voyage. Under these circumstances it appears to me that the freight was lost to the owners by the restraint of princes.

It was further contended that in any case the loss was a constructive total loss, so that notice of abandonment was necessary. Now it appears to me that if a vessel insured on freight generally loses entirely from perils insured against the only freight in respect of which it has a contractual interest, and no other freight can be obtained on the insured voyage, the loss is an actual and not a constructive loss. If other freight can be obtained on the insured voyage the question might arise whether it could be earned without an expenditure which would exceed its value when earned, and the loss might then be a constructive total loss, or no loss at all. Here, as I have said, no freight could be obtained, and I think the loss an actual loss.

The question whether this was an actual or constructive total loss may be considered from another point of view. If this were a constructive total loss, what follows ? By s. 61 of the Marine Insurance Act, 1906, the assured may either treat the loss as a partial loss or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss. The question of abandonment only arises where there has been in fact a loss of the subject-matter insured, and the issue is whether that loss shall be partial or actual. It involves the loss of something in which the assured has an insurable interest at the time of loss. If a vessel is sailing with cargo on board the owners have a right to earn freight by carrying the cargo to its destination by that vessel or a substituted vessel. That right is the subject of the insurance, and if vessel or cargo be injured it may well be that the owner can abandon to the underwriters his rights to carry the cargo so as to enable them to earn freight. But when a vessel is sailing on an outward voyage to a loading port intending to carry home cargo in respect of which a contractual obligation exists, and in the course of the outward voyage all the

rights in respect of such cargo disappear by a peril insured against, what is there to abandon ? The subject-matter in respect of which the loss is made has disappeared, and there is nothing left analogous to ship or cargo, or right to carry forward cargo, still in existence which can be made over to the underwriters. I cannot conceive that the ship has to be handed over to the underwriters to become a seeking ship. In such a case I do not think there can be either a constructive total loss or an abandonment. The only question that can arise is, Was there an actual loss at all, either total or partial ? But, even were there a constructive total loss in this particular case, I think that notice of abandonment would be unnecessary, for the Act by s. 62, sub-s. 7, declares it to be " unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him." I am satisfied that the underwriters here could have derived no benefit if notice had been given to them at once. Notice of abandonment was not given till August 27. If it had to be given I think that it was given too late. The voyage had then been abandoned and the ship was at Norfolk, Virginia, and the underwriters had not been consulted as to her movements. But for the reasons I have given I think this immaterial.

The further point that remains to be dealt with is the question of non-disclosure. It is said that the fact that the charterers were a German firm was a material circumstance that ought to have been disclosed. The test is, Would it influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk ?—Marine Insurance Act, 1906, s. 18, sub-s. 2. In view of the law as laid down in *Sanday's Case* (1), I think there can be no doubt that that fact was actually material. But I am satisfied from the evidence called before me that on July 31, 1914, no underwriter would have been influenced by this circumstance, for the simple reason that it would never have occurred to him that the inability to deliver which arose in the circumstances of this case could constitute a loss by perils insured against. I have had gentlemen of great experience in the underwriting world called before me on both sides, and the witnesses for the defence were as emphatic as those for the plaintiffs in asserting that the risk in *Sanday's Case* (1)

(1) [1916] 1 A. C. 650.

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Atkin J.

did not enter into the matter. Counsel for the defendants, however, bravely threw over his witnesses on this point. He said that a prudent insurer within the meaning of the section must be taken to know the law, and to know that the law was as laid down in *Sanday's Case.* (1) Knowing so much, he would clearly have been influenced. I think that this standard of prudence indicates an insurer much too bright and good for human nature's daily food. There seems no reason to impute to the insurer a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intelligent insurers carrying on business in that market at that time. The evidence satisfies me that if the standard of prudence is the ideal one contended for by Mr. MacKinnon, there were in July, 1914, no prudent insurers in London, or if there were they were not to be found in the usual places where one would seek for them. I am satisfied that in this respect the defendants' judgment would not have been influenced had the fact that the charterers were German been disclosed. It was sought, however, to say that the circumstances would have affected the underwriters' judgment as to the risk of seizure, and witnesses for the defence were called who gave evidence to that effect. Mr. Saunders, the defendants' underwriter, however, quite properly admitted that up to the date of the insurance he had never known an underwriter ask an assured to tell who the charterer was ; and this evidence only confirms that given by the witnesses for the plaintiffs. I think that this was not a circumstance which would have any real influence upon an underwriter's judgment on July 31, 1914, and that it need not have been disclosed. I am led by the correspondence to suspect that this defence of non-disclosure was an after-thought. But, however this may be, I do not think the defence valid. Under these circumstances I think that the plaintiffs are entitled to succeed, and that there must be judgment for them for the amount claimed with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs : *William A. Crump & Son.*
Solicitors for defendants : *Waltons & Co.*

(1) [1916] 1 A. C. 650.

F. O. R.

Applied. CHANDRIS *v.* ISBRANDTSEN-MOLLER CO. INC. [1950] 1 All E.R. 768.

Followed. CHANDRIS *v.* ISBRANDTSEN-MOLLER INC. [1951] 1 K. B. 240

[IN THE COURT OF APPEAL.]

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March 29, 30; *April* 26.

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Ship—Charterparty—Demurrage—Period of Demurrage not specified—Detention of Ship beyond a reasonable Time—Damages.

A charterparty provided: Steamer to be loaded with customary berth despatch, and, it detained longer than five days, charterers to pay demurrage at the rate of fourpence per ton per day, provided such detention shall occur by default of charterers or their agents. The original port of loading having been wrecked by a tidal wave the ship was by agreement diverted to another port, where great difficulty was experienced in loading and despatching ships at and from that port. At the expiration of a reasonable time beyond the lay days the charterers had not commenced to load the steamer, and she was further detained for the purpose of loading. The plaintiffs claimed damages for the detention beyond the reasonable time:—

Held, affirming the decision of Sankey J. [1917] 1 K. B. 31, that the demurrage rate of compensation applied to the whole period of detention, and therefore that the plaintiffs were not entitled to damages as distinguished from the demurrage rate for the extra period of detention.

Western Steamship Co. v. *Amaral Sutherland & Co.* [1913] 3 K. B. 366 followed.

Dictum of Lord Trayner in *Lilly & Co.* v. *Stevenson & Co.* (1895) 22 R. 278 disapproved.

Ardan Steamship Co. v. *Andrew Weir & Co.* [1905] A. C. 501 distinguished.

APPEAL from the decision of Sankey J. (1)

The plaintiffs, the owners of the steamship *Inverkip*, claimed damages from the defendants, the charterers, for thirteen days' detention of the vessel from September 17 to September 29, 1915, at 200*l.* per day. By the charterparty the vessel was to proceed to New Orleans or Galveston and load a grain cargo for a safe port in the Mediterranean not east of the west coast of Italy and excluding Africa, "steamer to be loaded according to berth terms, with customary berth despatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of fourpence British sterling, or its equivalent, per net

(1) [1917] 1 K. B. 31.

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register ton per day, or pro rata, payable day by day, provided such detention shall occur by default of charterers or their agents." The charterparty also contained this clause: "Time for loading, if required by charterers, not to commence before August 25, 1915." It also provided that in certain events the charterers should have the option of cancelling the charter at noon on September 15. The *Inverkip* was to have loaded at Galveston, but owing to serious damage to that port by a tidal wave she was directed to load at Newport News, where she arrived on August 18. Her lay days began on August 25, but owing to the difficulty of getting the grain to that port, the congestion of the port, and the fact that a grain elevator there was destroyed by fire, there was great delay in the loading. Demurrage at the agreed rate, which amounted to 46*l.* 15*s.* 4*d.* per day, was paid by the defendants from September 1 to September 17. On the latter date, the loading not having then been begun, the plaintiffs' solicitors wrote as follows to the defendants: "We are instructed to give you notice that our clients contend that the vessel is no longer on demurrage and that as from this date they will claim damages for detention, which they estimate at 200*l.* per day. They have therefore instructed the master not to accept any further payment of demurrage." To that letter the defendants replied: "We must protest against the course which the owners threaten to adopt, and we must refer them to the charterparty, which defines the rights of the parties." The vessel waited for her cargo, and the defendants tendered the demurrage rate day by day till September 29, on which date the loading was completed, but as it was refused by the master it was deposited, and the defendants brought the amount into Court. The plaintiffs contended that it was an implied term of the charterparty that the defendants should not be allowed to keep the vessel on demurrage at the specified demurrage rate for more than a reasonable time, which time, they said, expired on September 17. The defendants denied that there was any implied term in the charterparty as alleged by the plaintiffs, and they further denied that a reasonable time was exceeded in the loading of the vessel. On the evidence Sankey J. held that on September 17 a reasonable time for keeping the vessel on demurrage had expired, that the demurrage rate of compensation applied to the whole period of detention, and that the

plaintiffs were not entitled to damages as distinguished from the demurrage rate in respect of the detention after September 17.

The plaintiffs appealed.

R. A. Wright (*Roche, K.C.*, with him), for the appellants. Where, as here, a charterparty provides for a number of lay days, and then for demurrage at a fixed rate, without specifying any period during which demurrage shall be paid, the ship can only be kept on demurrage for a reasonable period after the expiration of the lay days, and after that reasonable period has elapsed the shipowner is entitled to damages at large. The appellants' case is based on the meaning of "demurrage," which from its nature refers to a detention of a defined or limited extent. Where its extent is not expressly defined a reasonable period is to be implied. Where the demurrage days have expired and no cargo is forthcoming the charterer is in breach and the owner may repudiate and take the ship away; and his right to damages has accrued: *Nolisement* (*Owners*) v. *Bunge & Born.* (1) Where the demurrage days are not limited by the contract they will be limited by law to what is reasonable in the circumstances: *Wilson & Coventry* v. *Otto Thoresen's Linie* (2); *Lilly & Co.* v. *Stevenson & Co.* (3) See also Carver's Carriage by Sea, 5th ed., s. 609. The stipulated rate of demurrage only applies to a rightful detention; but the charterer cannot insist on detaining the ship after a reasonable time has expired. Where there is subsequent detention the shipowner is entitled to damages. In *Western Steamship Co.* v. *Amaral Sutherland & Co.* (4) Bray J. decided the point against our contention. That was decided on a point of law, and on appeal the Court took the view that the facts ought to be further ascertained and discharged the order of Bray J. without assenting to or dissenting from his judgment. (5) The point, therefore, is still open.

[WARRINGTON L.J. referred to *Sanguinetti* v. *Pacific Steam Navigation Co.* (6), where Brett J.A. said: "The question of whether payment or compensation to be made over the lay days is to be considered as demurrage, or whether it is to be considered as

(1) [1917] 1 K. B. 160.
(2) [1910] 2 K. B. 405.
(3) 22 R. 278.
(4) [1913] 3 K. B. 366.
(5) [1914] 3 K. B. 55.
(6) (1877) 2 Q. B. D. 238, 251.

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detention, generally depends upon this, whether there is a fixed number of demurrage days mentioned in the charterparty, because if there is a fixed number of days beyond lay days, and the ship is delayed by the fault of the charterer, then the detention beyond that is what is called a detention, to be compensated for by damages; but here the number of demurrage days is not mentioned at all, and, therefore, all the detention beyond the lay days seems to me to be demurrage, and quite within the demurrage clause."]

Brett L.J. was not there considering the case of abnormal detention, i.e., whether you can have demurrage days for ever. Assuming that a reasonable time has elapsed, is the owner placed in this dilemma, either he must withdraw the ship or else accept payment at the demurrage rate?—Scrutton's Charterparties and Bills of Lading, 7th ed., p. 283. In the judgment appealed from Sankey J. said (1): "In my opinion the parties have in this case agreed that one and the same rate, namely, fourpence per net register ton per day, shall be paid however long the ship is detained. I do not of course mean that the ship can be detained for ever; I mean while she is detained for the purpose for which she has gone to the port—in this case to load a grain cargo." He draws a distinction between detention for the purpose of loading and for an ulterior motive, such as malice or spite. Delay in furnishing a cargo is just as much a by-motive as malice or spite. In *Ardan Steamship Co.* v. *Andrew Weir & Co.* (2) the charterers were held liable in damages on the ground that it was their primary duty to furnish the stipulated cargo. The detention there, as here, was not due to delay in loading, but to not having a cargo ready for loading. In this charter "if detained longer" means if detained in the loading. Detention for an extraneous purpose is not within the agreed rate of demurrage, and the damages are at large. [They also referred to *Harris* v. *Jacobs*. (3)]

Leck, K.C., and *Theobald Mathew*, for the respondents. The cause of the default is immaterial. If the charterers are in breach they must pay demurrage at the agreed rate. It is said that the words "if detained longer" are subject to some limitation. There is no ground for any limitation, and the cause of the detention is

(1) [1917] 1 K. B. 36. (2) [1905] A. C. 501.
(3) (1885) 15 Q. B. D. 247.

immaterial. The shipowner has his remedy in the right to withdraw the ship. Sankey J. has rightly held that the demurrage rate of compensation applies to the whole period of detention.

Roche, K.C., in reply. "If detained longer" means "if detained in the loading." Delay in the loading is one thing, and failure to provide a cargo is another. The demurrage clause refers only to delay in the loading. The obligation upon the charterer is to provide a cargo and have it at the port of loading.

[SCRUTTON L.J. referred to *Jackson* v. *Union Marine Insurance Co.* (1)]

The cases on frustration of contracts do not apply.

April 26. WARRINGTON L.J. The question in this case is whether the plaintiffs (shipowners) are entitled to recover from the defendants (the charterers of one of the plaintiffs' vessels), in respect of the detention of the ship, damages of an unliquidated amount or demurrage at the rate per ton per day fixed by the charterparty. The learned judge, Sankey J., has accepted the defendants' view and awarded the agreed rate. This is very much less than the plaintiffs claim to be entitled to on the other footing, and they appeal to this Court.

The learned judge was of opinion that the detention was for a period longer than was reasonable, but that, notwithstanding this fact, the clause providing for the payment of the rate per ton per day was wide enough to cover the detention which had occurred, and that even if the shipowners might properly have withdrawn the ship, they did not do so and therefore must accept what the contract allows them. In so deciding the learned judge was following the decision of Bray J. in *Western Steamship Co.* v. *Amaral Sutherland & Co.* (2)

I think the case is simply one of construction. Does the provision as to demurrage payable for detention after the fixed lay days apply to the detention which actually took place, or did such detention constitute a breach of contract not covered by the special provision and therefore giving rise to a claim for damages at large ? [The Lord Justice stated the terms of the charterparty and the material facts, more fully given above, and proceeded :]

(1) (1874) L. R. 10 C. P. 125. (2) [1913] 3 K. B. 366.

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There was evidence that the delay was occasioned by the defendants' failure to provide a cargo in this sense, that owing to the change of ports and the other circumstances I have mentioned it was impossible to obtain a cargo at Newport News for the ship—a new cargo had to be obtained elsewhere and was not ready so as to enable the ship to be loaded earlier than the actual time.

It was contended that on the true construction of the charterparty the clause I have read is confined to mere delays in loading and does not extend to cover detention occasioned by failure to provide a cargo. Reliance was placed on the case of *Ardan Steamship Co.* v. *Andrew Weir & Co.* (1) as establishing that the obligation to load in accordance with the charterparty and the obligation to provide a cargo are separate and distinct obligations, and I accept that view. But I cannot hold that in the present case the provision for demurrage is confined to delay in loading. The demurrage becomes payable only in case of default by the charterers; there are no words limiting that default, as the plaintiffs contend it should be limited, and I can find nothing in the contract sufficient to introduce such a limitation. It is true that the clause begins with the words "Steamer to be loaded," &c., but this seems to me to do no more than indicate that the detention referred to is detention at the port of loading, detention at the port of discharge being dealt with by a subsequent clause.

I think the answer to the plaintiffs' claim is that, whether deliberately or by inadvertence, the parties have provided that the shipowners shall accept compensation at a fixed rate in respect of the detention which has in fact occurred and therefore they must be content with that.

I prefer to express no opinion on the question whether or not the plaintiffs were entitled to withdraw the ship on September 17 or on any other day. That question does not arise.

The result is that in my opinion the appeal fails.

SCRUTTON L.J. The Inverkip Steamship Company, owners of the steamship *Inverkip*, appeal against a decision of Sankey J. that the sum paid into Court by the defendants, Bunge & Co., the charterers of the *Inverkip*, for demurrage at her port of loading is sufficient.

(1) [1905] A. C. 510.

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The charter, dated July 16, 1915, provided that the steamer should call at Key West for orders for New Orleans or Galveston to load a grain cargo—" Steamer to be loaded according to berth terms, with customary berth despatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of four pence (4*d.*) British sterling, or its equivalent, per net register ton per day, or pro rata, payable day by day, provided such detention shall occur by default of charterers or their agents." This was a printed clause, and, from my experience, the rate of demurrage (about 47*l.* a day) was low for that time. By a written clause the steamer was to be discharged at the rate of 500 tons per running day, demurrage at the rate of 100*l.* per running day. " Time for loading, if required by charterers, not to commence before the 25th day of August, 1915." Option of cancelling if steamer not ready to load by September 15, 1915.

Just before the vessel arrived at Key West for orders a tidal wave seriously damaged the shipping facilities at Galveston, and great delay was probable at that port, for which the steamer would get no demurrage. It was accordingly arranged that the steamer should be ordered to Newport News at 6*d.* reduction in freight. She arrived there on August 18, and her lay days began on August 25. The five lay days in the demurrage clause expired on the evening of August 31.

Unfortunately the same idea had occurred to the persons interested in numerous other ships going to Galveston, and they also were diverted to Newport News. There was great congestion of the ships in the harbour, and of their cargoes on the rail to Newport News, and on September 5 one of the two elevators in the port was burnt. In the result many ships had long delays. Out of a list of thirty-three ships furnished to us six went away in ballast after waiting an average of twelve days; some ships which arrived in the beginning of September took nearly a month to load. The ships, however, which arrived about the same time as the *Inverkip* were loaded in an average of about a fortnight; but the *Inverkip* and the *Ampleforth*, both chartered by Messrs. Bunge, and with cargo to be supplied by the same shippers, took over five weeks to load. It is difficult to draw accurate conclusions from the list, as it does not distinguish between the ships originally destined for Newport

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and those diverted thereto; but I have no doubt on the evidence (1.) that there was considerable and unusual delay owing to congestion of shipping and railways due to the Galveston disaster, so that the "customary berth despatch" would be much longer than in normal times; (2.) that the shippers of Messrs. Bunge were in default in sending down cargo, perhaps through financial weakness. The charterers paid demurrage daily up to September 17, when the shipowners claimed they were not bound to wait any longer and proposed to withdraw the steamer. They were no doubt influenced in this by the fact that the rate of demurrage was low. The charterers repudiated this claim and proposed to take proceedings in the American Courts to detain the steamer. The captain waited but refused to accept the daily chartered demurrage which the charterers paid into the bank. On September 20 the shipowners issued a writ claiming a declaration that the charterers were not entitled to keep the ship on demurrage after September 17, and damages for detention. Towards the end of September the charterers supplied cargo, and the *Inverkip* was loaded by September 29. The shipowners then claimed thirteen days damages for detention at 200*l.* per day, and the charterers paid into Court thirteen days demurrage at the chartered rate.

Sankey J. found that the vessel was "kept an unreasonable time" every day after September 17, but, following a decision of Bray J. in *Western Steamship Co.* v. *Amaral Sutherland & Co.* (1), held that as the vessel stayed and loaded cargo under the charter she could only claim the charter rate of demurrage, and the amount paid into Court was therefore sufficient. He gave judgment for the charterers with costs.

The shipowners appeal.

The sum agreed for freight in a charter covers the use of the ship for an agreed time for loading or discharging, known as "the lay days," and for the voyage. But there is almost invariably a term in the agreement providing for an additional payment, known as demurrage, for detention beyond the agreed lay days. This is sometimes treated as agreed damages for detaining the ship, sometimes as an agreed payment for extra lay days. In my view the mere fact that the charterer has not loaded the ship in the lay days

(1) [1913] 3 K. B. 366.

does not entitle the shipowner to withdraw the ship from the service; and whether the payment for these days after the lay days on which the ship is detained is treated as agreed liquidated damages or as an agreed payment for time which the charterer has a right to use at his option, the amount to be paid for these days is fixed by the charter. On the other hand it is obvious that the charterer is not entitled to keep the ship on demurrage "for ever." What is the time when he may treat his obligation to stay as removed and sail away?

Counsel for the shipowners said that this time came when a reasonable time had elapsed. Asked "a reasonable time for what?" they had some difficulty in answering. Take a charter "to load with customary steamship despatch," which, under the decision in *Hulthen* v. *Stewart & Co.* (1), means "to load in a reasonable time, having regard to the existing circumstances for a charterer having a cargo ready," or to pay 50*l.* a day demurrage for every day on which the vessel is detained beyond the lay days. The reasonable time for loading is exhausted by the lay days. What is the second reasonable time at the end of which the ship may leave? Her days on demurrage are part of an unreasonable time for loading. Is the Court to determine what is a reasonable degree of unreasonableness? In my view the test of reasonable time is not one that is applicable. To enable the ship to abandon the charter without the consent of the charterer I think the shipowner must show either such a failure to load as amounts to a repudiation of or final refusal to perform the charter, which the shipowner may accept as a final breach and depart claiming damages—*Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2)—or such a commercial frustration of the adventure by delay under the doctrine of *Jackson* v. *Union Marine Insurance Co.* (3) as puts an end to the contract. Neither of these positions avails here; the charterers were not repudiating the contract, but were paying the agreed demurrage under it, and were promising and expecting to begin to load the ship every day. While, as the charter contemplated under the cancelling clause lay days which might begin as late as September 14 and days in demurrage after lay days expiring in that case on September 20, and the ship was in fact

(1) [1903] A. C. 389. (2) (1884) 9 App. Cas. 434, 439.
(3) L. R. 10 C. P. 125.

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loaded by September 29, I cannot make any finding of commercial frustration of the adventure, the delay being provided for by demurrage.

One main argument of the shipowners' counsel as I understood it was that as the charterer was bound to have a cargo ready for loading, and had not such a cargo, the demurrage provision did not apply. This is in my experience an entirely novel argument. Ships with twenty lay days have frequently loaded no cargo for, say, twelve days because none was there and either finished in their lay days or in some demurrage days ; but it has never been contended or understood to be the law that because there was no cargo there when the ship was ready to load the charterer had lost the benefit of the demurrage days or lay days and was bound to load in a reasonable time or pay damages for detention. It would often be greatly to the disadvantage of the ship that such a view should be taken. Counsel founded this argument on the case of *Ardan Steamship Co.* v. *Andrew Weir & Co.* (1), a Scotch appeal relating to the great glut of ships in 1900 at Newcastle, N.S.W. The decision is not very easy to understand, in that the noble Lords do not state their views as to the correctness of two decisions of the English Court of Appeal as to the same port and glut of ships—*Barque Quilpué, Ld.* v. *Brown* (2) and *Jones* v. *Green & Co.* (3) Coal is loaded at Newcastle from collieries a short distance from the quays and cranes, at which there are no storing facilities for coal, the custom of the port being to load in regular colliery turn. In *Barque Quilpué, Ld.* v. *Brown* (2) the charter was to load in regular turn from D. Colliery. In *Jones* v. *Green & Co.* (3) it was to load in the usual and customary manner (blank for name of colliery) as ordered by purchasers, who ordered Wallsend Colliery. There was great pressure of orders at all collieries. The ships were loaded in regular colliery turn, but after very long delay. The English Court of Appeal decided each case in favour of the charterers. In *Ardan Steamship Co.* v. *Andrew Weir & Co.* (1) the charter was " to load in the usual and customary manner a full and complete cargo of Australian coal as ordered by the charterers." The ship loaded in her turn, but after a long delay. The House of Lords decided in favour of the ship, and Lord Halsbury said that

(1) [1905] A. C. 501. (2) [1904] 2 K. B. 264.
(3) [1904] 2 K. B. 275.

delay in loading was one thing, failure to provide a cargo and load another ; and the ship was given damages for detention (there being no demurrage days in the charter), her loading time being calculated not from her getting a berth in regular colliery turn, but from her arrival.

I, like Sankey J., am unable to see the bearing of this decision on the present case. Here the cargo had to be provided at the port on August 25 ; the lay days have been calculated from that day and demurrage paid according to charter terms. If there was a breach in not having cargo ready on August 25 the only consequence is detention of the ship, and the damages for that, which is the same detention, however it arises, are agreed in the charter and have been paid. The truth is the shipowners have made a bad bargain as to demurrage rate in loading, emphasized by their having secured an agreement for a much higher demurrage rate for discharging, and are anxious to get out of it. I can see no valid legal or business reasons for helping them to do so.

As to the authorities cited, Lord Trayner's dictum in *Lilly & Co.* v. *Stevenson & Co.* (1) was not necessary for the decision of the case, the facts of which were nothing like the present case, and turned on the somewhat unusual application of excepted perils to the demurrage period. For the reasons already stated I cannot agree with it, or with the late Mr. Carver's approval of it. So far as Bray J.'s decision in *Wilson & Coventry* v. *Otto Thoresen's Linie* (2) follows these dicta in allowing the ship to sail at "a reasonable time after the expiration of the lay days," I cannot agree with it, and indeed the learned judge fixed his "reasonable time" partly by the future engagements of the ship, which is a little puzzling. The decision negatives the right of the ship to sail at the expiration of the lay days when there is a provision for demurrage, and in this I agree. In *Western Steamship Co.* v. *Amaral Sutherland & Co.* (3) Bray J. explained his decision in *Wilson & Coventry* v. *Otto Thoresen's Linie* (2), and held that where the ship stayed and loaded she could only claim the charterparty rate of demurrage. This was followed and adopted by Sankey J. in the present case, and in this I agree, though on the facts of this case I think the result would have been

(1) 22 R. 278. (2) [1910] 2 K. B. 405.
(3) [1913] 3 K. B. 366.

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the same had she left; she could not have claimed damages for detention.

The judgment appealed from was in my opinion correct in result, and the appeal must be dismissed with costs.

LORD COZENS-HARDY M.R. I agree.

Appeal dismissed.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Thomas Cooper & Co.*

G. A. S.

Dictum of SWINFEN EADY, L.J., at p. 207, *applied.* NOEMIJULIA STEAMSHIP CO., LTD. *v.* MINISTER OF FOOD. [1950] 2 All E.R. 699.

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[IN THE COURT OF APPEAL.]

ARMEMENT ADOLF DEPPE *v.* JOHN ROBINSON & CO., LIMITED.

Ship—Demurrage—Lay Days—Arrival at Place of Discharge—Readiness to discharge.

Where a charterparty or berth contract does not contain any express provision to name a berth and does not provide for delivery at a berth "as ordered," and the ship arrives at the end of the specified voyage and is anchored or moored waiting for orders, and is ready to discharge in the sense that there is nothing to prevent her being made ready at once, if desired, the lay days commence to run.

APPEAL of the plaintiffs from the judgment of Bray J. at the trial of the action without a jury.

The following statement of facts is taken from the written judgment of Swinfen Eady L.J.:—

"The plaintiffs, as owners of the steamship *Elizabeth van Belgie*, claimed against the defendants, as indorsees of bills of lading and receivers of cargo, eight days' demurrage for the detention of the ship at Avonmouth. The case was tried before Bray J. and the plaintiffs recovered for three days only. The plaintiffs appealed and claimed for the remaining five days. During the argument it was conceded that for one of the days the plaintiffs could not maintain their claim, and the case proceeded with regard to four days only.

"The bills of lading incorporated the terms and conditions of a berth contract, dated September 13, 1915. The cargo consisted of grain in bulk and linseed and pollards in bags; the ship was to proceed to 'Avonmouth and Sharpness (two ports) or as near thereunto as she can safely get, always afloat, and deliver the cargo in accordance with the custom of the port for steamers, unless otherwise provided for as per clause 25, on being paid freight,' &c.

"Clause 25 dealt with the time for discharging, and provided that for grain cargoes, without fixed lay days, the rate of discharge at Avonmouth should be 600 tons a day based on bill of lading quantities, reporting day not to count. Demurrage 3*d.* per gross register ton per running day for steamers of over 4000 tons dead weight cargo capacity. The bill of lading quantities for Avonmouth were 3059, and at the before-mentioned rate of discharge this quantity should have been discharged in six lay days.

"The ship arrived at Walton Bay from Buenos Aires on October 24, 1915, was entered at the custom-house on October 26, and on October 28 at 11 A.M. was permitted to pass into the docks at Avonmouth, where she was made fast to some mooring buoys, as there was not then any discharging berth at the quay available for her—of this she was informed before entering the docks. On November 2 she was berthed at the quay and discharge began, and it was finished on November 11, at 7 P.M. The judge held that the six lay days expired on November 8, and allowed demurrage for the three days to November 11.

"At the trial various points were raised by the defendants and decided against them by the judge, and there is not any cross-appeal by the defendants. The judge, however, did not allow the plaintiffs' claim in respect of the four days between October 28 and November 2, which are the subject of this appeal, on the ground that the ship, although an 'arrived ship' on October 28, was not 'ready to discharge' her cargo until November 2."

Leck, K.C. (*Raeburn* with him), for the plaintiffs. The ship was ready to discharge at the buoy on October 28, and the shippers are from that date bound to pay demurrage in the absence of default on the part of the shipowners. There was no default on the part of the

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shipowners such as would prevent the shippers from carrying out their contract. The contract to pay demurrage for delay and detention of the ship during unloading was absolute: per Vaughan Williams J. in *Budgett & Co.* v. *Binnington & Co.* (1) The ship was ready to fulfil the obligation on her part; she was ready to do what was necessary to discharge the cargo, although she had not got the stevedore's men on board, if she was ready to have them on board when delivery was asked for by the consignees. If there is any obligation of readiness, it is only an obligation to be ready in the ordinary course when the time comes for discharging. The contract ought to be interpreted in a commercial sense. [He also referred to *Leonis S.S. Co.* v. *Rank* (2), *Vaughan* v. *Campbell, Heatley & Co.* (3), and *Grampian S.S. Co.* v. *Carver & Co.* (4)]

MacKinnon, K.C. (*R. A. Wright* with him), for the defendants. The problem is to determine when a ship is an "arrived ship," as to which there was considerable confusion prior to the decision in *Leonis S.S. Co.* v. *Rank*. (2) The effect of that decision is that, in order to ascertain whether a ship is an "arrived ship" and whether the obligation of the charterer as to loading or discharging her has arisen, three conditions must be fulfilled—(1.) the ship must have arrived at her destination, (2.) she must have given notice of her readiness to load or discharge, and (3.) she must in fact be ready to load or discharge. What is readiness to load is a question of fact rather than of construction. The applicability of *Budgett & Co.* v. *Binnington & Co.* (5) only arises when you have got past the moment of time when the ship has become an arrived ship. [He then dealt with the facts, contending that they showed the ship was not ready to load on October 28.]

Cur. adv. vult.

Feb. 26. SWINFEN EADY L.J. read the following judgment: [After stating the facts as above, his Lordship proceeded:]

Having regard to the decision in *Leonis S.S. Co.* v. *Rank* (2), it is not open to dispute that on October 28 the ship was an "arrived ship." Her destination was Avonmouth, and she had reached that

(1) (1890) 25 Q. B. D. 320, 327; [1891] 1 Q. B. 35.
(2) [1908] 1 K. B. 499.
(3) (1885) 2 Times L. R. 33.
(4) (1893) 9 Times L. R. 210.
(5) 25 Q. B. D. 320.

place and entered the dock there and was safely moored at the buoys. The charterers were entitled, in accordance with the decision in *The Felix* (1), to indicate the discharging berth ; but as the charter-party did not contain any express words empowering the charterer to name the berth, and the cargo was not for delivery "at a berth as ordered," the lay days would commence if "ready to discharge" although the vessel was not in her discharging berth.

Discharge could have been effected at the buoys, although not usual, and the consignees of the cargo did not desire it. Bray J. states in his judgment that nobody really thought that there was going to be a discharge at the buoys, but he held that the defendants were at liberty to take advantage of what he said was a technical point, but a technical defect in the plaintiffs' case, that the plaintiffs had not proved that the ship was "ready to discharge" until November 2.

The question raised by this appeal is whether upon the facts not in dispute the ship was ready to discharge cargo when moored at the buoys. The hatches had not been taken off while the vessel was at the buoys, nor did the owners' stevedores bring all their discharging gear on board then. On the other hand, the receivers' stevedores did not bring any of their gear on board until the vessel arrived at the quay ; they had to provide cables and weighing machines and planks, and also to provide the gear for lowering into barges any cargo so taken, and the evidence of the owners' stevedore was that as a rule they were able to get the gear which the ship had to provide on board quicker than the merchants' stevedore could get theirs. The plaintiffs' contention is that the ship was ready to discharge when at the buoys—if the merchants had been willing to take delivery there, the owners would have rigged up their tackle, and opened the hatches and been ready to commence actual delivery, as soon as or sooner than the merchants would have been ready to accept delivery ; and that the only reason why these preparations were not made was that the merchants did not desire delivery at the buoys, but preferred to wait until the vessel was alongside the quay.

It is the duty of the merchants to co-operate with the owners in the receipt of cargo, and upon the facts I am satisfied that the only reason why the ship did not take on board the gang and rig the gear

(1) (1868) L. R. 2 A. & E. 273.

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to fulfil the owners' duty in discharging was that the receivers were not desirous of receiving the cargo at the buoys, and so were not willing to co-operate in her discharge there and made no preparations for doing so.

The ship was lying at a waiting berth, her voyage being ended; it would have been an idle form to take on board men and open hatches and make other preparations at the buoys when there was no desire or intention of the merchants to receive cargo until the ship was berthed at the quay.

The ship was ready to discharge in a business and mercantile sense, and the idle formality of incurring useless expense was not necessary as a condition precedent to the commencement of the lay days.

Where a charterparty does not contain any express provisions to name a berth and does not provide for delivery at a berth "as ordered," and the ship arrives at the end of the voyage specified in the charterparty, and is anchored or moored waiting for orders and is ready to discharge in the sense that there is nothing to prevent her being made ready at once, if desired, the lay days commence to run.

In my opinion this appeal should be allowed, and the plaintiffs should have judgment for the four additional days' demurrage.

BANKES L.J. read the following judgment: This is an appeal from a decision of Bray J. refusing to allow the plaintiffs' claim for demurrage in respect of any of the days during which the plaintiffs' vessel was moored to the buoys in Avonmouth dock before she reached a berth at the quay.

The vessel was in fact admitted into the dock and moored to the buoys at 11 A.M. on October 28. There was at that time no berth vacant for her, and she was not in fact berthed until November 2. The vessel had passed the customs before she entered the dock, and while lying at the buoys there was nothing to prevent the discharge of the cargo into lighters had the consignees and the shipowners co-operated to discharge the vessel in that manner. The point in dispute between the parties was whether the vessel was ready to discharge when she was moored to the buoys and while she remained there. For the owners it was contended that she was; for the

consignees that she was not. Questions both of fact and of law were raised in the Court below and in this Court. For the consignees it was contended that the vessel must be actually ready to discharge in order to entitle the owners to claim demurrage, and that this vessel was not ready at any time while she lay at the buoys. For the owners it was contended that as the obligation upon consignees was to discharge in a fixed number of days it was not necessary for them to prove a readiness and willingness on the part of the master to discharge, but the consignees must show that they were prevented from taking delivery by some act of the master or of those for whom he was responsible. For the latter contention the respondent relied upon *Budgett & Co.* v. *Binnington & Co.* (1), and particularly upon the judgment of Vaughan Williams L.J. at p. 326 in the report of the case in the Court of first instance. The respondents, on the other hand, relied upon the decision in the case of *Leonis S.S. Co.* v. *Rank* (2), and particularly upon a passage in the judgment of Kennedy L.J. Bray J. accepted the contentions of the respondents both upon the facts and the law. It is not necessary to express any opinion upon the question of law, as I do not agree with the learned judge's conclusion upon the facts, with regard to which it appears to me that there was really no dispute upon the particular point which for the present purpose is the only material one. From the evidence it appears that the practice at the port of Avonmouth is for the shipowner and the consignee each to engage their own men to perform that particular part of the operation of discharging which falls to their share, that each set of men provide their own gear, and that the discharge cannot commence until each set of men has provided their share of the necessary gear. There was some conflict of evidence as to how long it would take the shipowners' stevedore to rig up his gear. The learned judge accepts the view that the necessary time was about three hours, and he holds that because the ship had not that gear rigged and in position to commence delivery while she was lying at the buoys she was not ready to deliver so as to entitle her owners to claim demurrage for that period. I am unable to come to this conclusion upon the evidence which was before the learned judge. It appears to me quite clear upon the evidence that

(1) 25 Q. B. D. 320; [1891] 1 Q. B. 35.
(2) [1908] 1 K. B. 499, 517, 518.

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all parties concerned—namely, the dock officials, the consignees, and the representatives of the ship—were all of one mind, and that no one either desired or required the discharge to commence until the vessel arrived at her berth. Under these circumstances the rigging of the gear while the vessel lay at the buoys was a needless and a useless thing to do. Upon the evidence I consider it impossible to say that the master was not ready and willing to discharge. The witnesses on both sides appear to me to be all agreed on this point.

The chief officer of the vessel speaks to everything being ready to discharge when the ship entered the dock, ready to give delivery when the vessel was at the buoys. This was not disputed so far as the ship herself was concerned; the only thing that required to be done was the rigging by the stevedore of the necessary gear. The superintendent of stevedores employed by the shipowners said that the ship's stevedores did not employ labour on board until the receivers asked them to do so. This statement was not contradicted. This witness went further and spoke to the defendants' (Messrs. Robinson's) agent, telling him that they could not take delivery till the ship was in dock, by which I understand he meant in berth. A representative of the ship's brokers said that none of the receivers spoke to him about taking delivery at the buoys, and he also said that he gathered that it was the intention of the receivers not to begin the unloading until the vessel got to the berth. The principal witness for the defendants on this point was the outside supply foreman for the defendants, Messrs. Robinson. He seems to have made several conflicting statements, but in cross-examination he admitted that the consignees' men do not take their things on board until they have arranged with the stevedores when they are going to work, and he added: "We see one another; if he does not come to us we go to him." He further said that "the stevedore, Mr. Cox, met us when the ship was at the buoys, and we arranged we could not work there; neither of us could." He gave further answers to the same effect. This man's evidence seems to me so entirely in accordance with the evidence given for the plaintiffs that I cannot come to any other conclusion but that it was a matter of mutual arrangement, or understanding, that the discharge should not commence at the buoys. Under these circumstances, whatever the exact legal obligation of the shipowner may be with regard to the readiness of his vessel, in

the present case I think that it does not lie in the defendants' mouth to say that the ship was not ready, and on these grounds I think that the appeal succeeds.

SCRUTTON L.J. read the following judgment: The owners of the steamship *Elizabeth van Belgie*, whom I call the shipowners, brought an action against three bill of lading holders, receivers of grain and linseed, for eight days' demurrage of the ship at Avonmouth. Bray J. at the trial allowed them three days' demurrage only. They appeal.

The bills of lading incorporated the terms of a berth note as to discharge. By that berth note, in the events that happened, the ship was to discharge at Avonmouth, having six days for discharge. She entered the Avonmouth dock and lay at the buoys, then a usual place for ships waiting for a berth, on Thursday, October 28. The shipowners alleged that time for discharge began that day; the receivers alleged that by a custom of the port time did not begin till the ship reached her loading berth alongside the quay, which was Tuesday, November 2.

They failed to prove their custom, and time would therefore begin on October 28 if the ship had fulfilled the obligations on her. But it was proved that on October 28 she had not gear rigged for her part of the discharge or men on board to do that part. Accordingly Bray J., saying that this was a technical point, but one that he could not disregard as "de minimis," as it would, on the evidence, take half a day to erect the gear, held that as the ship was not on October 28 "ready to discharge" the time for discharge could not begin till she was so ready. He therefore fixed the commencement of the time on November 2, when she began to discharge in fact. The six days expired on November 8; and as the ship finished at Avonmouth on November 11 he gave the shipowners three days' demurrage.

The phrase that the ship must be "ready to load" or "ready to discharge" before her time for loading or discharge can begin has been frequently used by the Courts and text-writers. In *Sailing Ship Lyderhorn* v. *Duncan Fox & Co.* (1) the Court of Appeal adopted as to "readiness to load" the language of Mr. Carver's work

(1) [1909] 2 K. B. 929.

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at s. 221 that a vessel is not ready to load unless she is discharged and ready in all her holds so as to give the charterer complete control of every portion of the ship available for cargo. But this does not give much assistance as to "readiness to discharge." In particular I cannot find that the meaning of that phrase has ever been considered in those cases where the place where time begins is a place where ships wait to go to a berth, and not a place where ships usually discharge. Up to 1908 this position would arise in cases where the ship was chartered to discharge in a dock, such as *Tapscott* v. *Balfour* (1), and where time began when she got into the dock, although owing to the crowded state of the dock she could not get to her discharging berth.

I should be surprised to find that in practice it was ever thought necessary for the ship as soon as she entered the dock to rig her discharging gear, and get men to do her part of the discharging on board, before her time could begin to run, though it was well known that, at the place where she was, discharging would not take place. Such a requirement would be quite unbusinesslike. The question assumed a much wider aspect when in 1907 the decision of the Court of Appeal in *Leonis S.S. Co.* v. *Rank* (2) introduced some certainty into a law at that time confused by a number of very contradictory decisions.

The practical question of business was on whom should the risk of losing time in waiting till a berth was ready fall, on the goods owner or the shipowner. When the charter was to a dock, time began when the ship got into the dock though she had to wait for a berth, and the risk of loss of time was placed on the goods owner. When the charter was to "a berth as ordered," time did not begin till the vessel reached the berth though the goods owner ordered a berth which the shipowner could not reach at once, and the risk of loss of time was placed on the shipowner. On whom did the risk fall when the ship was chartered to a port and the goods owner had the right to name the berth in the port to which the ship should go? The Court of Appeal in *Leonis S.S. Co.* v. *Rank* (2) held that the time began when the ship had reached the port in the commercial sense, where she was at the disposal of the charterer "as a ship ready as far as she is concerned to discharge," though not at the discharging

(1) (1872) L. R. 8 C. P. 46. (2) [1908] 1 K. B. 499.

berth : per Buckley L.J. (1) This decision at once added largely to the number of cases where time would begin before the ship was at her discharging berth. And I cannot bring myself to hold that it was necessary for such a ship before her time would begin—that is, when the risk of loss of time is transferred to the goods owner—to make preparations for discharging at a place where on the hypothesis discharging will not take place. In *Leonis S.S. Co.* v. *Rank* (2) time began while the vessel was lying in the river Parana, where ships were usually loaded when they got alongside quays and piers. I do not think any Court containing judges so conversant with commercial matters as Lord Alverstone and Kennedy L.J. would have held that the ship, when her time began in the river, was required to have her derricks rigged and men on board to do work, which work could not be required till she got alongside the pier. Where time begins at a usual discharging place I think it may well be that the ship must then be ready for a state of things which may at once happen. But when the ship's time begins at a place which is not a usual discharging berth (and she cannot be required to discharge at any other place) I think her obligation to be ready to discharge is fulfilled if she is free from customs or quarantine restrictions and ready to proceed to her actual discharging berth and to be ready to discharge when she reaches it.

If this is so, unless the buoys in Avonmouth dock were a usual discharging place, the ship was not bound to rig her stevedore's gear and have her stevedores on board for her work while lying there in order that her time should begin. The risk of loss of time while waiting there for a discharging berth would under the decision in *Leonis S.S. Co.* v. *Rank* (2) be on the goods owners.

As to the receivers of grain, I am clear that they did not intend to take delivery at the buoys, or treat the buoys as a discharging berth, however ready the ship was. They had placed their share of the discharge in the hands of the dock authorities, and those authorities, who were trying to set up a custom that time did not begin till the vessel reached the quay, wrote on November 3: "I cannot depart from the principle that the steamer's time, so far as the dock committee is concerned, commences from the time that the steamer is in berth and ready to deliver. This was not till the morning of November 3."

(1) [1908] 1 K. B. 512. (2) [1908] 1 K. B. 499.

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The case of the linseed is more difficult, as the linseed was going into lighters; and the receiver of the linseed gave very contradictory evidence. "The stevedores had not put in their gear. If they had we should have taken delivery at the buoys." "We arranged we could not work at the buoys; neither of us could." "I did not mean we were ready to have taken delivery at the buoys." It is clear, however, that the linseed receivers never asked for delivery at the buoys, or sent to take delivery; and I am not satisfied on the evidence that the buoys were a usual place of discharge for linseed. I think, therefore, time began to run when the ship reached the buoys, and the ship was ready to discharge, in the sense explained, but as it would take half a day to rig the stevedore's gear I think the amount recovered should only be seven days' demurrage, or 371*l.* 1*s.* 9*d.*, for which sum judgment should be entered for the plaintiffs with the costs here and below.

It was argued that the principle of *Budgett & Co.* v. *Binnington & Co.* (1) that in a fixed time charter the goods owner is not excused by the inability of the shipowner to perform his work when the time has begun to run, unless such inability arises from the default of the shipowner or his servants and prevents the goods owner from fulfilling his part of the work, applies also when the shipowner's inability is in existence at the commencement of the lay days. It is not necessary to decide this point now, though it and the effect of the decision in *Budgett & Co.* v. *Binnington & Co.* (1) may require consideration on some future occasion.

The appeal must be allowed with the result stated above.

Appeal allowed.

Solicitors for plaintiffs: *Holman, Fenwick & Willan.*
Solicitors for defendants: *Downing, Handcock & Co.*

(1) [1891] 1 Q. B. 35.

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Feb. 19, 20, 21, 26; *March* 5.

THE KING *v.* WESTMINSTER ASSESSMENT COMMITTEE. *Ex parte* LONDON AND PROVINCIAL VICTUALLERS, LIMITED.

THE KING *v.* ISLINGTON ASSESSMENT COMMITTEE. *Ex parte* ROYAL AGRICULTURAL HALL COMPANY.

Rating — Metropolis — Reduction in rateable Value — Provisional List showing Value unaltered—Duty of Assessment Committee to strike out Entry—Provisional List made in last Year of Quinquennial Period— "As altered on appeal"—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47, *sub-s.* 10—*Practice—Mandamus—Order Absolute —Time for appealing—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15—*Order* LXXI., *r.* 1—*Crown Office Rules*, 1906, *r.* 206—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 36), *s.* 100.

Under s. 47 of the Valuation (Metropolis) Act, 1869, it is a condition precedent to the retention by the assessment committee of a hereditament in a provisional list that the hereditament should have been increased or reduced in value in the course of the year, and if in a provisional list as presented to the assessment committee for their adjudication a hereditament is entered as being of the same value as that at which it stood in the valuation list then in force and the assessment committee come to the conclusion that there has been no such increase or reduction in value, they are bound to strike it out, notwithstanding that by so doing they will, in the event of its being assessed at a lower value on the revision of the valuation list, deprive the occupier of the benefit of the rebate provided for by s. 47, sub-s. 10, which enacts that "if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed."

Semble that the words "as approved and altered on appeal" in that sub-section are to be read as meaning "as approved *or* altered on appeal," and that if in the course of the last year of the quinquennial period specified in the Act a hereditament is assessed in a provisional list at a different value from that at which it stood in the valuation list then in force, and subsequently on the making of a new valuation list the assessment committee reduce the value to a figure with which the occupier is satisfied, he is entitled to the rebate provided by the sub-section notwithstanding that he does

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not appeal to the quarter sessions against the assessment committee's decision.

An application for a prerogative writ of mandamus is a civil proceeding commenced otherwise than by writ in manner prescribed by rules of Court, and is consequently an action within the definition of that word in s. 100 of the Judicature Act, 1873. Therefore an order making absolute a rule nisi for a mandamus is appealable at any time within six weeks from its date.

In re Fawsitt (1885) 30 Ch. D. 231 applied.

APPEAL from two orders of a Divisional Court (Lord Reading C.J., Ridley and Lord Coleridge JJ.) discharging a rule in the first case and making a rule absolute in the second case for a mandamus to deal with two provisional valuation lists according to law. The two cases were heard together.

THE KING *v.* WESTMINSTER ASSESSMENT COMMITTEE.

In this case the London and Provincial Victuallers, Limited, were the occupiers of a public-house known as the Cheshire Cheese, Surrey Street, in the city of Westminster. In the valuation list in force for the year 1915 the premises were entered at the rateable value of 327*l.* The occupiers, alleging that the value had been reduced since the last valuation, partly by the increase of duty on liquor and partly by the legislation restricting the hours of sale during the war, in March, 1915, made a requisition to the overseers for a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869 (1), showing the reduction in value. The assessment committee appointed a valuer, who made a provisional list showing the premises as standing at the same figure, 327*l.* The occupiers served notice of objection to the provisional list so made, and on the hearing of the objection on May 19, 1915, the assessment committee refused any reduction and struck the premises out of the provisional list. The year 1915 was the fifth year of the quinquennial period under the said Act, and consequently, there being no supplemental list to which objection could be made that it did not include the entry of the premises in question, there was no means of appeal to quarter sessions against the assessment committee's decision. In June, 1915, the new quinquennial valuation list was made, and in it the rateable value of the Cheshire Cheese was entered as 327*l.*, but on

(1) See note on p. 246, post.

the hearing of an objection by the occupiers the assessment committee on September 13, 1915, reduced the figure to 225*l.* With that figure the occupiers were satisfied, and no appeal from it was carried to quarter sessions. The occupiers complained that the assessment committee had no jurisdiction to strike out the entry from the provisional list, and that by reason of their so doing the occupiers had been deprived of the benefit conferred by s. 47, sub-s. 10 of the Act, and they accordingly obtained a rule nisi for a mandamus to restore the entry.

THE KING *v.* ISLINGTON ASSESSMENT COMMITTEE.

In this case the Royal Agricultural Hall Company were the owners and occupiers of the Royal Agricultural Hall, in the parish of Islington. On October 30, 1915, the clerk to the assessment committee wrote to the Secretary of the company a letter in the following terms :—

" Dear Sir,

" Quinquennial Valuation, 1915.

" Royal Agricultural Hall.

" I have been instructed by the assessment committee to inform you that they have now determined the valuation of the Royal Agricultural Hall in the Quinquennial Valuation List, 1915, for the Borough and Parish of Islington at 8500*l.* gross and 5500*l.* rateable.

" This valuation represents, as your representative was informed, a compromised settlement in view of existing difficulties in arriving at an entirely satisfactory valuation, and it is on the understanding that the question of the valuation can be reopened at the instance of either party, and that the quinquennial valuation list figures shall not be used to the prejudice of either party."

On April 4, 1916, the company made a requisition for a provisional list on the ground that the premises had been reduced in value by reason of the Minister of Munitions having put a restriction on the use of the building. A provisional list was accordingly made, but the rateable value was stated at the same figure of 5500*l.* The assessment committee heard the owners' objection to that figure, but refused to alter it, and struck the premises out of the provisional list. The company obtained a rule upon similar grounds to those in the Westminster case. Subsequently, and before the argument on

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the rule, the provisional list was embodied in the supplemental list, against which the company lodged an appeal on the ground that it was defective in not containing the hereditaments in question, and that appeal was now pending.

The arguments on the two rules were heard together before the Divisional Court on January 24, 25, and 26, 1917.

The Court held, in the Westminster case, that the mandamus must be refused—by Lord Reading C.J. and Lord Coleridge J. on the ground that the occupiers could not claim the benefit of s. 47, sub-s. 10, because, although the new quinquennial list, in which the premises were assessed at the lower figure of 225*l.*, was a "revision of the valuation list" within the meaning of the sub-section, the list was not so "altered on appeal"; by Ridley J. on the ground that a provisional list which left the value of the premises at the same figure as that at which they stood in the valuation list was not under any circumstances an effective list so far as related to those premises.

In the Islington case, on the other hand, where there was an appeal pending, on the hearing of which the list might possibly be altered, Lord Reading C.J. and Lord Coleridge J. (Ridley J. dissenting) held that the occupiers sufficiently brought themselves within the sub-section, and that the mandamus must be allowed. The Court accordingly discharged the rule in the Westminster case and made the rule absolute in the Islington case.

The applicants in the Westminster case appealed. The appeal was heard on February 19, 20, and 21, 1917.

Ryde, K.C., and *Tyrrell T. Paine* (*Konstam* with them), for the appellants the London and Provincial Victuallers, Limited. The question turns on the construction of s. 47 of the Valuation (Metropolis) Act, 1869. (1) An assessment committee on hearing an objection to a provisional list under s. 47, sub-s. 6, have no power, it is submitted, to strike out an entry in the provisional list of a hereditament which has been inserted at the same figure at which it stood in the list then in force; because if so struck out the objector loses the benefit of a possible rebate provided for in s. 47, sub-s. 10.

(1) See note on p. 246, post.

Sect. 47 creates the provisional list. Other sections define the making of the quinquennial and supplemental lists. These sections have laid down rules for the making of the first quinquennial list, and by reference apply them to every subsequent quinquennial and supplemental list, but not to a provisional list. The only way in which an assessment committee can deal with a provisional list is to hear objections to it and to allow or disallow them. They cannot exercise judicial powers. Their powers are only ministerial, first, to bring the list into being and then to allow or disallow objections to it. These powers are strictly limited by the provisions of s. 47. In regard to the quinquennial and supplemental lists, the assessment committee have power independently of any objection being made to make alterations under s. 20 of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103); but that section does not apply to s. 47 of the Act of 1869. It cannot have been intended that s. 20 of the Act of 1862 should be read into s. 47; there is no room for it there. When once the provisional list is made containing the particular property the assessment committee have no power to remove that property from the list. The House of Lords in *London County Council* v. *Islington Assessment Committee* (1) have held that the bringing of the provisional list into being is purely a ministerial act. They held no more than that: if they did, it was obiter. Unless, therefore, s. 47 gives the assessment committee power to strike a hereditament out of the provisional list they have no power to do so. In the present case it is submitted that the assessment committee have not made a provisional list at all.

The sections of the Act of 1869 cannot be made to work if they are construed strictly. Sect. 47, it is submitted, should be prefaced by the words "If it is alleged that" or "If the circumstances raise a possibility that," and in sub-ss. 1 and 2 the word "may" should be read as "shall." Under sub-ss. 6 and 7 the duty of the assessment committee only arises when notice of an objection to the list has been served. That makes s. 19 of the Act of 1862 applicable, and the committee cannot go outside the objection. The duty of the committee differs according as there is or is not an objection made: *Rex* v. *Shoreditch Assessment Committee.* (2) Apart from the failure of the present appellants to bring themselves within sub-s. 10 of

(1) [1915] A. C. 762. (2) [1910] 2 K. B. 859.

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s. 47 the Divisional Court held that their contention was right. Sub-s. 10 cannot mean what the Lord Chief Justice held it to mean. The words "approved and altered on appeal" should be read as "approved *or* altered on appeal," or the words "if any" should be added after the word "appeal."

On the facts it is submitted that the committee have not heard and determined on the objection. The affidavit of the respondent is not satisfactory. Evidence was offered and not considered. It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by finding facts one way or another: *Bunbury* v. *Fuller* (1); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2); *Rex* v. *Bradford* (3); *Hudson* v. *Rhodes.* (4)

It was suggested that a mandamus, if granted, would not be effective, as no rebate would be due to the appellants under s. 47, sub-s. 10, because "revision" there referred to did not apply where the next list was the new quinquennial list. The point was raised and argued in *Parrish* v. *Hackney Corporation* (5) and decided against such contention. [They also referred to the Valuation (Metropolis) Act, 1869, ss. 1, 7, 18–23, 42, 43, 45, and 46.]

Courthope-Munroe, K.C., and *D. Bartley*, for the respondents, the Westminster Assessment Committee. The judgment of Ridley J. in the Court below was right. The whole of s. 47 is governed by the preamble to that section. It is a condition precedent to any provisional list becoming an effective list that there should be an increase or reduction in value. The whole purpose of the provisional list and supplementary list is to bring the quinquennial list up to date: s. 43. A property does not automatically go into the supplementary list by being put in a provisional list. It is only where there is an alteration in value that this occurs. If there is no alteration in value, then the property is not inserted. This would not be such an "omission" as to give a right of appeal against a supplementary list.

The House of Lords in the *Islington Case* (6) only altered the procedure. Formerly, if the committee or the owner were satisfied

(1) (1853) 23 L. J. (Ex.) 29, 35.
(2) [1891] A. C. 531.
(3) [1908] 1 K. B. 365.
(4) [1909] 1 K. B. 85.
(5) [1911] 2 K. B. 822; [1912] 1 K. B. 669.
(6) [1915] A. C. 762.

that there was a prima facie case of alteration in value the property was inserted in the list. The House of Lords has held that the making of the draft list is purely ministerial in order to give the parties an opportunity of having the property in question properly considered by the assessment committee. In that case it is stated that the list is not to be effective unless there has been an alteration in value. The list only becomes an effective list after the committee have heard the objections and come to the conclusion that there is an alteration in value. If there is no alteration the list is of no avail. One would not expect to find anything in s. 47 as to deletion in a case where the figure was the same, inasmuch as the whole section is conditioned on there being an alteration in value. Further, s. 20 of the Act of 1862 applies.

If the argument for the appellants is correct, there would be two lists in existence, which would be quite contrary to the scheme of the Act, and further the quinquennial list would be antedated twelve months.

The committee heard the matter on the merits. No evidence was tendered, and it is not suggested that the committee refused to hear any evidence or rejected it. The onus is on the objector to make out his case.

The mandamus, if granted, would not be effective. "Next revision," in s. 47, sub-s. 10, means revision of the valuation list for the time being in force, that is the current quinquennial list, and not the list which is to come into force. The sub-section does not apply to the fifth year of a quinquennial list, but only to the preceding four years : *Reg.* v. *Poplar Union Assessment Committee* (1) ; *Metropolitan Water Board* v. *Phillips.* (2)

It is true that Warrington J. in *Parrish* v. *Hackney Corporation* (3) decided this point contrary to our contention, but in the Court of Appeal (4) it was not really dealt with, and it is submitted that the case on this point was wrongly decided. [They also referred to *Burton* v. *Bloomsbury Vestry* (5) and to ss. 11 and 32 of the Act of 1869.]

Ryde, K.C., in reply.

(1) (1884) 13 Q. B. D. 364.
(2) [1913] A. C. 86.
(3) [1911] 2 K. B. 822, 827.
(4) [1912] 1 K. B. 669.
(5) [1901] 1 K. B. 650.

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[LORD COZENS-HARDY M.R. We need not trouble you on the point as to "revision."]

There is no statutory authority under s. 47, sub-ss. 6 and 7, to make the alteration. The Act impliedly excludes power to do what is not specified in the section. The ratepayer is no worse off than he was before the decision of the House of Lords. Assuming that the assessment committee have decided, can the Court review their decision?

[LORD COZENS-HARDY M.R. What is the provisional list?—The draft list, or the list last signed by the committee?]

It is unlikely that Parliament should have given power to impose a rate without at the same time giving a right of appeal, especially in the metropolis, where the rates are high.

It is unsound construction to sever sub-ss. 1–5 of s. 47 from the sub-sections which follow. If no objection is made, sub-s. 6 does not come into play. It is said that either under s. 20 of the Act of 1862 or under sub-ss. 6 and 7 of s. 47 of the Act of 1869 there is power to strike out. If that is so, then all the powers of s. 20 apply, including the power to increase. It is submitted that the power given by sub-s. 6 is limited to the case where there is an objection. It is incredible that Parliament should have given this power without also giving a right of appeal. Assuming, however, that we are wrong on the first point, then as the assessment committee have a duty to perform if certain conditions exist, their finding that those conditions do not exist must be open to review, otherwise they would be able to defeat any mandamus.

On the affidavits, it is submitted, it is clear that the assessment committee were guided by an entirely wrong principle in coming to their decision, and the Court ought to grant the mandamus asked for.

Cur. adv. vult.

Feb. 21. *S. G. Turner*, for the assessment committee in the Islington case, applied ex parte for leave to appeal from the decision of the Divisional Court.

LORD COZENS-HARDY M.R. said that he thought that the most convenient course would be that leave should be given to set down

the appeal at once, and the question whether it was in time could be raised by way of preliminary objection when the appeal came on to be heard. If the objection was disallowed, the appeal could then be heard and judgment given in both cases.

Feb. 26. *Talbot, K.C.*, and *S. G. Turner*, for the appellants the Islington Assessment Committee.

Ryde, K.C., and *Tyrrell T. Paine* (*Konstam* with them), for the respondents the Royal Agricultural Hall Company. There is a preliminary objection to the hearing of this appeal. The notice of appeal was given on February 21 and is therefore out of time. The question is whether this is an appeal from an interlocutory order or from an order, "whether final or interlocutory" in a "matter not being an action," within Order LVIII., r. 15. (1) It is manifestly not a final order, as it leaves something to be done. It is not, it is submitted, an order in an "action." "Action" is defined in s. 100 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), to mean "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court," and that definition is incorporated into the Rules of the Supreme Court by Order LXXI., r. 1. These rules have never been applied to a proceeding for mandamus so as to make it an action.

By Order LXII. of the rules scheduled to the Judicature Act, 1875 (38 & 39 Vict. c. 77), it was provided that nothing in the rules should affect the practice or procedure in proceedings on the Crown side of the Queen's Bench Division. At that time, therefore, proceedings by mandamus were excluded from the rules. Those rules were repealed and in part re-enacted by the Rules of the Supreme Court, 1883. By Order LXVIII., r. 1, of those rules proceedings on the Crown side were similarly excluded. Order LXVIII., r. 2, applied Order LXIII. to civil proceedings on the Crown side. Order LIII.

(1) Order LVIII., r. 15: "Subject and without prejudice to the power of the Court of Appeal under Order LXIV., r. 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks unless the Court or judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time . . . ."

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deals with actions of mandamus. In its original form it was in two parts, Part I. dealing with "Action of Mandamus" and Part II. with "Prerogative Mandamus." The Rules of 1883 apply only to matters which previously to the Judicature Act, 1873, were commenced by writ: Order I., r. 1. Order II., r. 1, directs that every action shall be commenced by writ of summons. This is inconsistent with a prerogative writ of mandamus being an action. By the Crown Office Rules 1886, r. 1, all existing rules or practice on the Crown side inconsistent with those rules were repealed. The interpretation clause (r. 306) did not incorporate the statutory definition of "action" in s. 100 of the Act of 1873. By r. 307 Order LIII. Part II. was repealed, and by r. 216 Order LVIII. was applied to mandamus. Rule 136, which deals with pleadings in mandamus, recognized that a proceeding for a prerogative mandamus was not an action. Rule 148 was inconsistent with the modern practice of a summons for directions. By the Crown Office Rules, 1906, r. 1, Order LXVIII., rr. 2, 3, and 4, so far as they related to proceedings on the Crown side, and the Rules of 1886 are annulled. Rule 206 applies Order LVIII. to civil proceedings on the Crown side, including mandamus, but the interpretation clause (r. 268) does not incorporate the definition of "action" in s. 100 of the Act of 1873 into the rules. In these rules a mandamus is treated as something which is not an action. By r. 49 an application for a prerogative writ of mandamus is made by motion for an order nisi. It would be repugnant to the context in Order LVIII., r. 15, to apply the statutory definition of an "action" to a proceeding by mandamus.

[WARRINGTON L.J. In *In re Wilson* (1) a proceeding commenced by originating summons was held to be an action.]

It is impossible, in Order LVIII., r. 15, to construe the word "action" as including mandamus. The failure of the argument for the appellants in *Austin Friars Steamship Co.* v. *Strack* (2) is conclusive on this point.

[LORD COZENS-HARDY M.R. referred to *In re Fawsitt.* (3) Is not that case inconsistent with your argument?]

It is submitted not. Proceedings by mandamus differ very considerably from administration proceedings commenced by

(1) (1890) 45 Ch. D. 266. (2) [1906] 2 K. B. 499.
(3) 30 Ch. D. 231.

originating summons. The Crown Office Rules assimilate to only a very limited extent a mandamus to what it certainly is not, namely, an action.

It is submitted, therefore, that, the order in the present case not being made in an action, the time for appealing is fourteen days.

Talbot, K.C., and *S. G. Turner*, for the appellants, were not called upon to argue.

LORD COZENS-HARDY M.R. This preliminary objection raises a point which, to my astonishment, has never been raised, so far as counsel are aware, in any case in the Court of Appeal. It really turns upon this: What is the true meaning and effect of Order LVIII., r. 15, when an appeal has been presented against an order of the Divisional Court granting a prerogative writ of mandamus? It is said on the one side that the time limited for that appeal is fourteen days; and on the other side that it is a much longer period. I do not pause here to consider whether the appeal is interlocutory or final, because that is not in substance the point that we have to consider. The material language of Order LVIII., r. 15, is this: "no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks unless the Court or judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time." On the one hand it is contended by Mr. Ryde, who has given us a most careful elaborate and interesting argument, that this is an order, either final or interlocutory, in a matter not being an action, and that, therefore, fourteen days is the time within which an appeal ought to be brought, and that the fourteen days have expired. In the view of the other side, as to which we have not thought it necessary to call upon Mr. Talbot, this is an action within the meaning of the definition in the rules to which a longer period applies; and, therefore, this appeal is within the time.

To ascertain the meaning of the words used we must go back to the Judicature Act, 1873, s. 100. The definition there is: "'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court." Mandamus

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proceedings are not commenced by writ, and the question is whether they are commenced "in such other manner as may be prescribed by rules of Court." The phrase "rules of Court" cannot be limited to the Rules of the Supreme Court contained in the Annual Practice, but they are words which extend also to the Crown Office Rules. Originally I think it is reasonably plain that proceedings for mandamus and for prerogative writs stood on a different footing from that on which they now stand. The application of Order LVIII. to them depends, not upon the rules contained in the Annual Practice, but upon rr. 49 and 206 of the Crown Office Rules, 1906. It is said that r. 206 provides that Order LVIII. of the Rules of the Supreme Court shall apply to all civil proceedings on the Crown side, including mandamus, prohibition, and quo warranto, and that quo warranto proceedings which are started by an application for a rule nisi are really part of a proceeding going back for many centuries. I think the answer to that is that they are now commenced by virtue of the Crown Office Rules, and that, therefore, they fall within the definition which I have read.

But then it is said that if the proceeding is not an action to start with, but is only made an action by the Crown Office Rules, how can it be a matter of appeal? I think the answer to that is to be found in the case of *In re Fawsitt* (1), which was a case dealing with an originating summons. There an originating summons had been taken out by one Galland for the administration of real and personal estate. It was dismissed by Bacon V.-C. on April 21, and on June 1 Galland gave notice of appeal against the order of dismissal. A preliminary objection was taken precisely similar to that which is taken by Mr. Ryde here, that the appeal was out of time, notice of appeal not having been given within the twenty-one days from the date of dismissal. The argument is very short, and I will read it: "An originating summons is not an action, but 'a matter not being an action' within Order LVIII., rule 15, and therefore under that rule the appeal must be brought within twenty-one days. By force of Order LXXI., rule 1, which makes the provisions of sect. 100 of the Act of 1873 apply to the Rules of Court, 1883, and by Order I., rule 1, and Order II., rule 1, 'action,' when

(1) 30 Ch. D. 231, 232.

used in the rules, means a civil proceeding commenced by writ. But by the same Order LXXI., rule 1, an originating summons, authorized by Order LV., rule 3, means a 'summons by which proceedings are commenced without writ.' The originating summons does not, therefore, satisfy the requirements of an action." The judgment of Cotton L.J. is, it seems to me, a direct authority in the present case. He says: "The question for us to decide on this preliminary objection is whether an order made upon an originating summons is an order made 'in a matter not being an action,' and consequently one from which an appeal must be brought within the twenty-one days limited by Order LVIII., rule 15. The 100th section of the Judicature Act, 1873, says that 'action' shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court. Then we come to the Orders of 1883. These must not be taken as being, or as intended to be, inconsistent with the provisions of the Act. Order I., rule 1, says that 'all actions which, previously to the commencement of the principal Act, were commenced by writ in the superior Courts of common law at Westminster . . . . and all suits which, previously to the commencement of the principal Act, were commenced by bill or information in the High Court of Chancery . . . . shall be instituted in the High Court of Justice by a proceeding to be called an action.' I do not understand that as saying that no proceedings but what are mentioned in that rule are to be called actions. But even if that were the case, an originating summons is a civil proceeding, and a civil proceeding commenced otherwise than by writ in manner prescribed by the rules is an action. I read Order II., rule 1, as meaning that every action is to be commenced by a writ of summons except where otherwise provided by the rules. Then we have rule 3 of Order LV., providing that certain civil proceedings shall be commenced by originating summons instead of by writ of summons; and we find in rule 1 of Order LXXI. an originating summons defined as a summons by which proceedings are commenced without writ. Taking that definition in connection with sect. 100, we must treat an originating summons as a civil proceeding commenced otherwise than by writ in manner prescribed by one of the rules of Court, and consequently as falling within the definition of an action. The limit of twenty-one days for appealing does not therefore apply, the

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order of dismissal being a final order in an action, and the preliminary objection must be overruled."

It seems to me, if I may say so with great respect, that that judgment is really conclusive of the present objection. I think a very difficult point was raised. I cannot think that we ought, in the matter before us, to go into the question of whether there is anything in the context or subject-matter of the rules which prevents us applying the language of the definition. I do not think that there is, so far as we are concerned. Of course, it is quite true that there are many differences between mandamus proceedings and an ordinary action, just as there are many differences between proceedings by originating summons and proceedings by an ordinary action. In proceedings by originating summons there is no writ and there are no pleadings, and there are many differences, and large portions of the rules do not apply to proceedings by originating summonses; but nevertheless, as a proceeding by originating summons is a proceeding commenced under the rules of Court otherwise than by writ, the Court has held that it is an action within the meaning of Order LVIII., r. 15. In my opinion, if this objection were to succeed we should be doing what is inconsistent with the view taken by this Court as to originating summonses, and I therefore hold that the preliminary objection fails.

WARRINGTON L.J. I am of the same opinion. The question that we have to determine on the preliminary objection is whether an order absolute for the issue of a prerogative writ of mandamus is an order in a matter not being an action within the meaning of Order LVIII., r. 15. In order to determine what is a "matter not being an action" one has first of all to ascertain what, within the meaning of the rule, is an action. For that purpose we are assisted by the definition of the word "action" contained in s. 100 of the Judicature Act, 1873, which definition is incorporated for the purposes of the Rules of the Supreme Court by Order LXXI., r. 1. The definition in s. 100 is this: "'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court." The Rules of the Supreme Court, as they exist at the present day, contain no provisions as to the manner in which

the civil proceeding for the purpose of obtaining the issue of a prerogative writ of mandamus shall be commenced. Those matters are regulated by the Crown Office Rules, 1906, but those rules are rules of Court within the meaning of that expression as used in s. 100 of the Judicature Act to which I have already referred. With regard to the prerogative writ of mandamus, it is provided by r. 49 of the Crown Office Rules, 1906, that "Application for a prerogative writ of mandamus shall . . . . be made to a Divisional Court of the King's Bench Division by motion for an order nisi." It seems to me, therefore, that there is now a rule of Court prescribing the manner in which the proceedings for obtaining the prerogative writ of mandamus shall be commenced, and that those proceedings, therefore, fall within the definition of "action" contained in the Judicature Act and incorporated into the rules. But then it is said that the definition is not to be regarded for the purpose of ascertaining whether these particular proceedings are an action or not. It is put in this way: It is said that the Crown Office Rules contain a definition clause which is silent as to the meaning of any of the words contained in the Rules of the Supreme Court, or as to the expressions used in the Crown Office Rules themselves, except the particular expressions mentioned in the definition clause; but by r. 206, Order LVIII. of the Rules of the Supreme Court is made to apply to all civil proceedings on the Crown side including mandamus, and our task, therefore, is to interpret, not the Crown Office Rules, 1906, but the Rules of the Supreme Court. For that purpose in my opinion we must look for the meaning of the expressions used to the definition contained in the rules themselves; and it is quite immaterial that the Crown Office Rules, 1906, do not contain that definition.

Then, with regard to the argument that that construction is repugnant to the context, it may be that, having regard to the context in some parts of the Rules of the Supreme Court, those proceedings could not be held to be an action; for example, the word "action" is used in Order II., r. 1, and it is clearly confined to proceedings commenced by writ; and there are many passages in the rules in which there would be a context which would prevent the application of the term "action" to such proceedings as proceedings for the issue of a prerogative writ. But what we have to interpret is

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Order LVIII., and there is nothing in the context there to show that the expression "action" is not used in the sense in which it is used in the definition clause.

It seems to me, therefore, that this is a proceeding in an action, and that, therefore, the time for appealing is the longer time provided by Order LVIII., r. 15.

SCRUTTON L.J. For two hours we have been considering the question of whether, in a fairly common form of legal proceeding, the notice of appeal given is in time or not; and, speaking for myself, I think it is a very unsatisfactory state of things that we should have to determine such a simple question by looking at a Chinese puzzle of statutes and references in which we have been engaged for these two hours.

The appeal is an appeal from an order making a rule nisi for a mandamus absolute. Mandamus being a civil proceeding on the Crown side, we start by going to the Crown Office Rules, 1906, and find that r. 206 provides that Order LVIII. of the Rules of the Supreme Court, 1883, shall apply to all civil proceedings on the Crown side, including mandamus. We therefore go to Order LVIII., r. 15, of the Rules of the Supreme Court, and we find in it that this notice of appeal, which was given more than fourteen days after the order in this case was made, is out of time unless this order is a final order in an action; for the rule provides that in the case of every interlocutory order, and any final order in a matter not being an action, the notice of appeal must be given within fourteen days. Owing to an intimation made by the Court, it is not necessary for us to determine whether this appeal is final or interlocutory and thereby to add another to the numerous decisions of the Court of Appeal, which, if I may respectfully say so, perfectly bewilder all readers. How are we to interpret the phrase in Order LVIII., r. 15, "in any matter not being an action"? It is said, on the one hand, that you will be able to interpret that by looking to Order LXXI., r. 1, and finding in that order that s. 100 of the Judicature Act, 1873, is incorporated. It is said, on the other hand, that you cannot do that; for r. 206 of the Crown Office Rules, 1906, which provides that Order LVIII. is incorporated, does not incorporate any other order; and therefore you are not allowed to look at any other order. I

think that construction is much too narrow. I put during the argument this: Supposing there is an Act of Parliament which contains an enacting clause and a definition clause, and another Act of Parliament incorporates the enacting clause, one would clearly be at liberty to find out what the words in the enacting clause meant by looking at the definition clause in the very Act in which the enacting clause was contained. When Order LVIII., r. 15, of the Rules of the Supreme Court is incorporated, it seems to me clear that you may ascertain what a word in Order LVIII. means by looking at the definitions given in the definition order of the Rules of the Supreme Court, and, when those definitions in terms send you to an Act of Parliament, going to the Act of Parliament to find what the definition is. Going to s. 100 of the Judicature Act, 1873, one finds that "action" means "civil proceedings commenced by writ:" (and the prerogative writ of mandamus is clearly not a "civil proceeding commenced by writ") "or in such other manner as may be prescribed by rules of Court."

Now is it prescribed by rules of Court how mandamus proceedings should commence? The answer is that it is. You will find in the Crown Office Rules, which are rules of Court within the meaning of this section, an exact prescription of how you shall commence proceedings for mandamus, with a further clause saying that on any other matters not provided for in these express provisions you are to follow the previous practice. Therefore you at once get out of the class of case in which it has been held that where a proceeding has been commenced under previous statutory authority, such as cases stated by magistrates in proceedings before magistrates, the proceeding does not come within these rules and is not a proceeding commenced "in such other manner as may be prescribed by rules of Court." A case which illustrates that is the case which has been cited of *Austin Friars Steamship Co.* v. *Strack* (1), where the proceeding was a hearing in the Divisional Court of counsel on a case stated by an alderman of the city of London under procedure under the Merchant Shipping Act, 1894, and it was held that that was not a proceeding commenced under rules of Court, although there were rules of Court which applied as to special cases in the High Court.

The only difficulty one has at first sight is in seeing the difference

(1) [1906] 2 K. B. 499.

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between proceedings for mandamus started under the Crown Office Rules and such proceedings as a counter-claim or an interpleader proceeding, both of which have been held not to be "proceedings commenced in such other manner as may be prescribed by rules of Court," although there are rules of Court which relate to them. The counter-claim case is *Lord Kinnaird* v. *Field* (1), and there, I think, the Court of Appeal took the view that a counter-claim was not a proceeding commenced but was an incident in a proceeding which had already been commenced. In the interpleader case, which is *Hamlyn* v. *Betteley* (2), Lord Selborne expressly said that an interpleader was a proceeding in an action, and not an action itself, and that there was no rule of Court prescribing the commencement of interpleader proceedings which depended upon a previous statute. Getting rid of the apparent difficulty caused by those cases, it seems that the application for a mandamus provided for by r. 49 of the Crown Office Rules, 1906, is a civil proceeding commenced "in such other manner as may be prescribed by rules of Court." Therefore, under Order LVIII., r. 15, it is a final order in an action, and the appeal may be within six weeks; and consequently the appeal in this case is in time.

Talbot, *K.C.*, and *S. G. Turner*, for the appellants. Only one question of law arises on this appeal, namely, whether the appellants the assessment committee had power to strike this hereditament out of the provisional list.

LORD COZENS-HARDY M.R. We are all of opinion, after hearing the arguments in the Westminster case, that as a matter of law the assessment committee had power to strike the entry out of the provisional list if they were satisfied that there was no alteration in the value of the hereditament during the year.

Ryde, *K.C.*, and *Tyrrell T. Paine* (*Konstam* with them), for the respondents, submitted that the appellants were estopped by the letter of October 30, 1915, from refusing a provisional list, and referred to *Southampton Gaslight and Coke Co.* v. *Southampton Union* (3), *Leicester Waterworks Co.* v. *Cropstone Overseers* (4),

(1) [1905] 2 Ch. 361.
(2) (1880) 6 Q. B. D. 63.
(3) (1877) 2 Q. B. D. 371, 375.
(4) (1875) 44 L. J. (M.C.) 92.

and *Hendon Paper Works Co.* v. *Sunderland Assessment Committee.* (1)

No reply was called for.

Their LORDSHIPS held upon the construction of the letter that there was nothing in it which imposed an obligation on the appellants to make a provisional list. They accordingly allowed the appeal on this point, but reserved their judgment on the question whether the appellants were entitled to strike the entry out of the list.

March 5. WARRINGTON L.J. read the following judgment:— The appellants the London and Provincial Victuallers, Limited, are the occupiers of a public-house known as the Cheshire Cheese, Surrey Street, in the city of Westminster. The respondents are the assessment committee for the city of Westminster. On May 5, 1916, the appellants obtained a rule nisi directing the assessment committee to deal according to law with the provisional valuation list, of which notice was given on April 30, 1915, containing the Cheshire Cheese on the grounds that the assessment committee unlawfully struck out from the said list the entry relating to the said premises, and that the said premises were reduced in value in the course of the year ending April 5, 1915, from a cause within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869. On January 26, 1917, the rule nisi was discharged by a Divisional Court of the King's Bench Division consisting of the Lord Chief Justice, Ridley J., and Lord Coleridge J. The ratepayers appeal to this Court.

The principal question to be determined is whether, the assessment committee having determined as a matter of fact that the hereditaments in question were not increased or reduced in value, they were justified in striking them out from the provisional valuation list. The general nature of the scheme for the valuation of hereditaments in the metropolis contained in the Valuation (Metropolis) Act, 1869, is as follows: In the year 1870 and in every fifth year thereafter a valuation list was to be made; any objections raised by ratepayers or others were to be determined by the assessment committee subject to an appeal to the London Quarter Sessions, and that list

(1) [1915] 1 K. B. 763.

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was to come into force at the beginning of the next financial year, that is to say, on April 6, 1871, and on April 6 in every fifth year thereafter, subject to revision as provided by the Act. The revision of this quinquennial list was provided for in ss. 46 and 47 of the Act. In each of the first four years of the quinquennial period a supplemental list is made out showing the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list. The supplemental list contains only the hereditaments affected by such alteration and comes into force at the beginning of the year succeeding that in which it is made. The same provisions as to objections and as to appeals to the London Quarter Sessions apply in the case of the supplemental or in that of the quinquennial list. Then s. 47 provides for a provisional revision by means of what is called a provisional list. The opening words of the section are as follows: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." The first five sub-sections provide that on the written requisition of the assessment committee, or of any ratepayer, or of the surveyor of taxes, the overseers are to send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of the hereditament mentioned in the requisition, and if the overseers should make default in sending such provisional list, then the assessment committee are to appoint a person to make it, and directions are given as to the service of a copy of the list on persons affected thereby and the making by such persons, or by the surveyor of taxes, of any objection to the list and for the hearing of such objections by the assessment committee. There is in this case no appeal to quarter sessions. Sub-ss. 6 and 7 are as follows: "(6.) The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just: (7.) If no objection is made, then on the expiration of the time for making objections, or if an objection is made then as soon as the assessment committee have determined on the objection, the assessment committee shall cause a copy to be made of the provisional list, with any alteration made in it by the committee, and shall return the list and the copy thereof, after being

dated and signed by their clerk, to the overseers." The provisional list is in operation from the date of service on the occupier and continues in force until the first list (supplemental or other) which is subsequently made comes into force, and the occupier is rated on the basis of the provisional list from the date on which it came into operation. Sub-s. 10 is as follows: "A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly; but if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditaments comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed."

In the quinquennial list made in the year 1910 the rateable value of the hereditaments in question was stated to be 327*l.*

In the year 1914 two circumstances are said to have occurred causing a reduction in value in that year. First, orders requiring the early closing of the house, and, secondly, the passing of the Finance (No. 2) Act, 1914, by which the duty on beer was largely increased. On March 27, 1915, the appellants sent to the respondents a requisition for the house to be entered on a provisional list on the ground of reduction of value. The body representing the overseers made default in sending the list as required by the Act, and on April 28, 1915, the assessment committee directed the town clerk to send the list. This he duly did, inserting as the value of the hereditaments in question 327*l.*, the same value as that which was entered in the quinquennial list. The appellants carried in an objection that this figure was too high. On May 19, 1915, the objection was heard and rejected on the ground that there was no reduction in value. The assessment committee having come to this conclusion struck the house out of the provisional list. The new quinquennial list was made later in the year, and in it the rateable

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value was entered as 327*l.*, but on the hearing of an objection by the appellants the assessment committee on September 13, 1915, reduced the figure to 225*l.*

The appellants are aggrieved by the omission of their house from the provisional list, even if it be entered therein as of the value of 327*l.*, because they lose the benefit of the rebate which they contend they would be entitled to under s. 47, sub-s. 10, and they accordingly sought by their application to the Court to have the house restored to the list.

The Divisional Court discharged the rule nisi, but the judges did not agree as to the reasons. The Lord Chief Justice and Lord Coleridge J. were of opinion that the assessment committee were not justified in striking out the house, but thought that this was of no practical consequence inasmuch as the determination of the assessment committee reducing the value to 225*l.* was accepted without appeal to quarter sessions and the smaller value did not appear in a list "as approved and altered on appeal," and therefore, even if the house was restored to the provisional list, the appellants would not be entitled to a rebate, and on this ground discharged the rule. Ridley J. was of opinion that the assessment committee were right in striking the name of the house from the provisional list. All three judges were of opinion that the determination of the committee on the question of fact could not be disturbed.

On this last point I agree with the Divisional Court that there was no ground on which the finding of fact by the assessment committee to the effect that the value of the premises was not reduced could be disturbed. I am unable, however, to agree with the majority of the Court in the construction they placed upon the last sentence of sub-s. 10 of s. 47. It is difficult to accept the view that the right of the ratepayer to a rebate depends upon a successful appeal to quarter sessions, and that the man who accepts the decision of the assessment committee is to be in a worse position than one who does not, and I see no difficulty in holding that on the true construction of the passage in question the words "as approved and altered on appeal" mean as approved and altered on appeal, if there be in fact an appeal and an alteration.

There, however, remains the question whether the assessment

committee were right in striking the house off the list as prepared by the town clerk. On this question we have been referred to, and in the course of the argument have had carefully to consider, the case of *London County Council* v. *Islington Assessment Committee.* (1) The point, and the only point, calling for decision and decided in that case was that the introductory words of the section are not a condition precedent to the sending to the assessment committee of a tentative or draft provisional list, the preparation of which is necessary before the judicial functions of the assessment committee given to them by sub-s. 6 can be brought into operation, and there are many indications in the speeches of the several noble and learned Lords who addressed the House, and particularly in that of Lord Sumner, that their decision was not intended to go beyond the point actually before them.

I am of opinion upon the true construction of s. 47, bearing in mind the decision in the case last referred to and the observations contained in the judgments, that sub-ss. 1 to 8 contain a description of the method by which the measure of the liability of the ratepayer in the particular case provided for is to be provisionally ascertained. The particular case is that of a hereditament in the value of which there has been an increase or a reduction, and this increase or reduction is an essential condition for the inclusion of the house in the list which is to settle the liability. If this be so, then if the assessment committee find that there is no increase or reduction in value they would be only making a just order (as they did in the present case) if they strike out the house in question from the tentative provisional list. Sub-s. 7, in my opinion, confirms this view. It contains reference to alterations made in the list by the committee, with no expressions confining such alterations to those made in consequence of the allowance of an objection. In fact, to keep the house in the list after a finding that there was no increase or reduction in value would be to give no effect to the introductory words of the section.

For these reasons, though they are not those on which the majority of the Divisional Court arrived at their decision, I am of opinion that they were right in discharging the rule nisi, and that this appeal fails.

In the Islington case the rule nisi was made absolute on the ground

(1) [1915] A. C. 762.

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that the committee were not entitled to strike the house out of the list on finding that there was no diminution, and on the further ground, distinguishing the case from the Westminster case, that there was an appeal pending from the refusal of the ratepayer's objection to the valuation list made next after the provisional list, in this case a supplemental list; and so the ratepayer might derive a benefit from his house being in the provisional list even at the original figure. The two cases are in my opinion indistinguishable, and, for the reasons already given, I think in this case also the committee were entitled to strike out the house from the list.

We have already disposed of the alleged ground arising out of the letter of October 30, 1915.

As regards the finding of fact as to value, I agree with the Divisional Court that there is no ground for disturbing it.

On the whole the appeal in this case succeeds, and the rule nisi should have been and must now be discharged.

SCRUTTON L.J. read the following judgment:—The London and Provincial Victuallers, Limited, who are the occupiers of licensed premises known as the Cheshire Cheese, and one Lowe, a rating surveyor representing them, obtained a rule nisi for a mandamus directing the assessment committee of the city of Westminster to deal according to law with the provisional valuation list for the year 1915–16 on the grounds that the assessment committee had unlawfully struck out of that list the entry relating to the Cheshire Cheese, and that that house had been reduced in value during the material year. When the assessment committee showed cause against the rule Lord Reading C.J. and Lord Coleridge J. were, I think, of opinion that the assessment committee had no power to strike out the entry in question, but as, for reasons to be referred to hereafter, the mandamus would not benefit the applicants, they refused to make the rule absolute. They also held that there was no ground for interfering with the decision of the assessment committee that the premises were not reduced in value. Ridley J. differed, thinking that the assessment committee had power to strike out the entry in question if they found that there was no alteration in value from a cause specified. The ratepayers appeal.

Under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67),

there are three forms of valuation list for rating in the metropolis. There is first the valuation list or "quinquennial list" which, subject to the alterations next to be stated, lasts for five years, commencing on April 6, following its making (s. 43). There is, secondly, the "supplemental list" (s. 46), made in each of the first four years of the quinquennial period, which is to show "all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list." It will not contain any hereditament not affected by any alteration. There is, thirdly, the "provisional list" (s. 47). The section prescribing it begins "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect"; and eleven sub-sections follow, the drafting of which gives rise to great difficulties of construction, owing, I think, to the fact that neither the draftsman nor Parliament had clearly thought out the system they desired to establish. The overseers or a person appointed by the assessment committee are to make a provisional list including "such hereditament," that is, the hereditament whose value is altered, and the value "as so increased or reduced." Notice of the list so framed is to be served on the owner of the hereditament and the surveyor of taxes, either of whom may then object to the list. Thereupon the committee shall hold a meeting, to which the persons interested are summoned, and shall determine on the objection. Whether there is an objection or not, the assessment committee shall then make a copy of the provisional list with any alterations made in it by the committee and shall sign it. After certain obscure provisions as to notice, the provisional list shall continue in force until the first list, supplemental or otherwise, which is subsequently made comes into force. The current rates are to be paid in conformity with the provisional list, and if when the next revision of the valuation list takes place "the list as approved and altered on appeal" contains a smaller value for the hereditament than that stated in such provisional list, the amount of rate "which has been overpaid in consequence of the larger value being stated shall be repaid."

Among the numerous oddities in this section it will be seen (1.) that if the next list contains a larger valuation than the provisional

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list the parish cannot recover the amount underpaid, though if that valuation be smaller the ratepayer can recover the amount overpaid; (2.) the valuation in the provisional list is made at one time, the next list at a later date. The house with a new wing may have its value increased in the provisional list, and then by a subsequent disaster such as a munitions explosion may have a very small value in the next list, and yet the rates properly levied on its increased value before it is blown up will have to be returned. It was found impossible in argument to suggest any reason for these extraordinary results.

The difficulty in the present case arises earlier in the section. The section in its wording appears to require an increase or reduction in the value of a hereditament before the machinery comes into operation. What is to happen if (1.) the overseers (sub-s. 1) or the person appointed by the assessment committee (sub-s. 2) think there is no increase or decrease? How is the person alleging such an alteration to get before the assessment committee, who will judicially decide after hearing him, whether there is such an alteration? And what is to happen if the assessment committee decide there is no alteration?

This difficulty was at first met by decisions and dicta that the machinery must start if there was a prima facie case for an alteration. But the first part of the section was exhaustively discussed by the House of Lords in *London County Council* v. *Islington Assessment Committee*. (1) The House of Lords certainly held that the earlier sub-sections of the section required action almost entirely ministerial. They held that the provisional list must be prepared for consideration by the assessment committee if the applicant applies seriously, sanely and in good faith, "unless it is apparent on the face of their application or of the facts available for their information that there is no arguable case, whether for reasons of fact or law." If this condition is fulfilled, the person who should make the list must include in it the hereditament in question even if he thinks the value is unaltered. In other words his duty is purely ministerial, to prepare a draft list in order that the point may be raised on objection and judicially determined by the assessment committee. The first three lines of the section do not state a condition precedent to the early sub-sections coming into operation. As was said by

(1) [1915] A. C. 762, 781.

Lord Atkinson in *Metropolitan Water Board* v. *Phillips* (1), the resultant list before it gets to the assessment committee "is not a provisional list in the true sense of the word at all. It is merely a list proposed by the overseers for the consideration of the body which has the sole right to fix and determine what the real and effective provisional list is to be, namely, the assessment committee."

But while the House of Lords have decided this, they have not decided that the first three lines of the section do not state a condition precedent to the later part of the section. On the contrary, Lord Parker says (2) "the difficulty is more properly met by treating the increase or decrease in value contemplated by the section as a condition precedent to the ultimate modification of the quinquennial valuation" (which I take to mean the effective provisional list settled by the assessment committee on which rates are paid) "and not a condition precedent to the preliminary steps necessary for the constitution of the tribunal entrusted with the duty of deciding whether, and to what extent, the quinquennial list is to be modified." And again (3): "In order to bring s. 47 of the Act into operation there must be an increase or reduction of the value of the hereditament in question." Lord Sumner says (4): "No provisional list ought to be put in force finally unless these" (i.e., the initial) "words of the section are satisfied, ... It cannot be that they" (i.e., the overseers) "are made judges of the question whether a case for a provisional list will be ultimately made out or not. . . . . Under sub-s. 6 the assessment committee hear and determine." In Lord Sumner's view the persons who prepare the draft list are not to insert "the value as the applicant contends that it has been reduced," or the value "as truly reduced," but the value "as they think it ought to be reduced, if at all" (5), leaving the surveyor of taxes or the ratepayer to object, if he thinks fit, and the assessment committee to decide the objection as is just. The draft list "in the first instance may restate the existing figure, if the appointed person thinks there has been no real change."

The assessment committee then hear and determine judicially.

(1) [1913] A. C. 99.
(2) *London County Council* v. *Islington Assessment Committee* [1915] A. C. 771.
(3) Ibid. 772.
(4) Ibid. 781.
(5) Ibid. 783.

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What is to happen if they find there is no real change? It is agreed there is no appeal against their decision. I think if they find there is no reduction or increase in value they are bound to strike the entry out of the provisional list. Their jurisdiction to make such a list is only "if in the course of any year the value of any hereditament is increased or reduced," and they are the judges of this. A construction that binds them to leave the entry in the list if an applicant says there is an increase or reduction in value though they think he is wrong appears to me to give no effect to the first three lines of s. 47 of the Act. Mr. Ryde, in his very careful and candid argument, agreed that on his view those words should be read as if they began "If it is alleged that," or "If the circumstances raise a possibility that." I find no warrant for such an addition. It is true that striking an entry out of the list deprives the ratepayer of any benefit he might get under the words of sub-s. 10; but these benefits seem so capricious and their reasons so difficult to follow that I see no reason for straining the rest of the section in order to increase the application of that sub-section. Mr. Ryde also argued that there was no express power in the section to the assessment committee to strike out an entry from the list. They have power when they deal with objections to make such order as they think just. Once it is understood that the list they deal with is only a draft, and their only jurisdiction is to make a list showing increase or reduction of value, I think the true objection is that there is no power to make an entry showing no alteration in value, not that there is no power to strike out such an entry.

The judgment of the Lord Chief Justice as I read it assumes, but does not clearly state why he assumes, that there is no power in the assessment committee to strike out an entry in the provisional list. Lord Coleridge J. in his judgment holds, as I think rightly, "That a provisional list which makes no change of value is not an effective provisional list," but appears to consider that if the next list, quinquennial or supplementary, shows an alteration in value (which must be a decrease to have any retrospective effect) a provisional list becomes effective, and that therefore the assessment committee must record the unaltered value on the chance that a change of value in a later list, which may depend on different circumstances altogether, may give it some effect under sub-s. 10. This again

appears to me to give no effect to the preamble to s. 47. I respectfully am unable to agree with the views of the construction of the section taken by the two judges in the majority in the Divisional Court, and prefer the result arrived at by Ridley J., who held that the assessment committee could not make a provisional list if they thought in their judicial capacity there was no increase or reduction in value.

Having arrived at this conclusion, the majority judges, however, held that as the ratepayer could get no benefit from the provisional list unless the ensuing list was altered on appeal so as to reduce its value, and that as in this case the value was reduced in the ensuing list without an appeal, so that there was no need to appeal, the ratepayers could never get any benefit from the provisional list if the entry stayed in, and therefore, as the Court did not grant a mandamus which would produce no beneficial result, the Court would not in this case grant a mandamus to insert the house with unaltered value in the provisional list. The words in sub-s. 10 on which the judges founded this argument were "if . . . . the list as approved *and* altered on appeal contains a smaller value." The result of this construction was that if the assessment committee were convinced there was a reduction in value, and so inserted that value in the list at the next revision, the ratepayer would get no benefit; he would only benefit if they were not convinced, and it took an appeal to rectify the list. In s. 43 the draftsman has used the language "The valuation list as approved by the assessment committee, and, if altered on any appeal . . . . as so altered, shall come into force . . . ." I think the words in s. 47 are only an incorrect summary of this fuller phrase, and may be read "or, if there is an appeal, as altered on appeal." The same result is obtained by reading "and" as "or": "as approved *or* altered on appeal." There are numerous cases, both on statutes, wills, and deeds, where "and" is read as "or," "or" as "and." The cases on statutes will be found collected in Maxwell on Statutes, 5th ed., pp. 386–388. As Sir George Jessel said in *Morgan* v. *Thomas* (1), "'or' never does mean 'and'" (or "and" "or") "unless there is a context which shews that 'or,' is used for 'and' by mistake . . . . You correct the wrong word used . . . . by the context."

(1) (1882) 9 Q. B. D. 643, 646.

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For these reasons I agree with the result of the Divisional Court's judgment that a mandamus to insert the entry in the provisional list should be refused, though not for the reasons given by the majority of the Court.

It was further argued before the Divisional Court, and more faintly before us, that there should be a mandamus to hear and determine. There was no suggestion that the assessment committee had not acted in good faith, and if there was no evidence on which they could find the fact of reduction, or if the evidence was contradictory, there is no appeal from their refusal to find such a fact. The affidavits were very unsatisfactory. Mr. Lowe said (paragraph 18): "I stated before the committee the objection of the company. I stated the profits were down and offered to give figures." He did not in fact give any figures, and Mr. Ryde admitted he could not say that evidence was tendered and rejected. The town clerk said (paragraph 12): "Mr. Lowe attended and addressed the committee, but adduced no evidence to prove any reduction in value. He did not produce any figures for any year since the quinquennial valuation." The Divisional Court held on this evidence no mandamus to hear and determine should be granted, and I agree with them. The prerogative writ of mandamus should not be granted on flimsy materials like this. Indeed, I think the argument was not that the assessment committee should rehear, but that this Court should sit as a Court of Appeal from their decision on evidence not before them. But the statute makes them the sole judges, subject to such power of correction of their decision as is given by sub-s. 10. The High Court cannot revise their decision unless there were no materials on which they could arrive at such a decision, or materials on which they must have arrived at another decision.

For these reasons I agree that the decision of the Divisional Court in the Westminster case refusing to make the rule absolute must be affirmed, though not for the reasons given by the majority of the Court.

At the same time cause was shown before the Divisional Court against a rule nisi obtained by the owners of the Royal Agricultural Hall against the assessment committee of the borough of Islington for a mandamus directing them to deal according to law with a provisional valuation list. In this case also the draft provisional

list contained an entry of the Royal Agricultural Hall at the same rateable value as had just been fixed in the quinquennial valuation. The ratepayers objected. The assessment committee heard the objection on three days, considered a number of documents and figures, and, finding that there was no alteration in value, struck the entry out of the provisional list as finally settled. For the same reason they omitted it from the next supplemental list. The ratepayers appealed. At the time of the hearing in the Divisional Court the appeal was still pending. Since then the parties have agreed to an altered figure, which, if approved by sessions, will appear in the supplemental list as revised.

The Divisional Court in this case made the rule absolute, the majority, Lord Reading C.J. and Lord Coleridge J., holding that, as the list might be altered on appeal, there was some use in the mandamus.

For the reasons given in the Cheshire Cheese case I think this decision was wrong. Ridley J. held there was no power or duty to make an effective provisional list if the assessment committee found there was no alteration in value. In this I agree, and think that the appeal should be allowed and the rule nisi discharged.

It was also suggested that this Court had some power to review the finding of fact of the assessment committee. I agree with the Divisional Court that they had no such power, the assessment committee on evidence before them having heard and determined a question of fact.

The appeal in this case must be allowed with costs.

WARRINGTON L.J. The Master of the Rolls asks me to say that he concurs in the two judgments which have been delivered.

Solicitors for London and Provincial Victuallers, Limited: *Godden, Home & Ward.*

Solicitors for Westminster Assessment Committee: *Allen & Son.*

Solicitor for Islington Assessment Committee: *A. M. Bramall.*

Solicitors for Royal Agricultural Hall Company, Limited: *Kingsford, Dorman & Co.*

NOTE.—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 46: "Every valuation list shall be revised in manner directed by this

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Act, and such revision in every period of five years (the first of such periods beginning with the sixth of April one thousand eight hundred and seventy-one) shall be conducted as follows:

"(1.) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations. If no alteration has taken place which makes a supplemental list necessary, the overseers shall send a certificate to that effect to the assessment committee in place of such list, which certificate may be in the form contained in the Second Schedule to this Act:

"(2.) In the fifth year of every such period the overseers shall make a new valuation list:

"(3.) The same regulations shall be observed and the same proceedings shall be had in the case of a supplemental list and a new valuation list as are directed by this Act and the Acts incorporated herewith in the case of the valuation list made in the first year after the passing of this Act:

"(4.) A supplemental list and a new valuation list shall come into force at the beginning of the year succeeding that in which they are respectively made, in the same manner and subject to the same conditions as the valuation list made in the first year after the passing of this Act:

"(5.) In each of the last four years of such period the valuation list which was in force on the day before the commencement of each such year, together with and as altered by the supplemental list, if any, which comes into force at the commencement of such year, shall be the valuation list which is in force during that year:

"(6.) A new valuation list when it comes into force shall supersede the valuation list which was in force during the fifth year of such period."

Sect. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

"(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament:

"(2.) A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list he shall forthwith summon the assessment committee, and the assessment com-

mittee shall appoint a person to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list:

"(3.) On the receipt of the list the clerk of the assessment committee shall serve on the surveyor of taxes for the district a copy of the list, and shall serve on the occupier of any hereditament to which the list relates a copy of so much thereof as relates to that hereditament. Every copy shall be accompanied by a notice specifying a day, being not less than fourteen days after the date of the service of the notice on or before which any objection to the provisional list may be made, and stating the mode in which an objection is to be made. Such copy and notice shall be served in the same way as notices by an assessment committee are served:

"(4.) An objection may be made to any such provisional list by the said occupier, and by the surveyor of taxes, or by either of them, by notice thereof in writing being served on the clerk of the assessment committee, on the overseers, on the surveyor of taxes, and on the occupier, or on such of them as the case may require:

"(5.) The clerk of the assessment committee, on the receipt of the notice of any objection, shall forthwith summon a meeting of the committee, and give notice of the time and place of such meeting to the overseers, to the surveyor of taxes, and the occupier:

"(6.) The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just:

"(7.) If no objection is made, then on the expiration of the time for making objections, or if an objection is made then as soon as the assessment committee have determined on the objection, the assessment committee shall cause a copy to be made of the provisional list, with any alteration made in it by the committee, and shall return the list and the copy thereof, after being dated and signed by their clerk, to the overseers:

"(8.) A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force:

"(9.) Upon a provisional list coming into operation the overseers shall make such entries in the rate book for the then current poor rate as will bring the same into conformity with such list, and shall also enter therein the date at which such list is to come into operation, and shall charge the occupier of such hereditament with a proper proportion of such current poor rate, regard being had to the time which has elapsed between the making of such rate and the said date and to the rateable value stated in such provisional list, and such occupier shall be

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considered as actually rated for such sum from the said date, and be liable to pay the same, and the same may be enforced accordingly:

"(10.) A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly; but if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed:

"(11.) Nothing in this section shall affect the value on which any rate is made or sum is assessed or contribution required which is made, assessed, or required on the totals of the gross or rateable value of parishes or unions."

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[IN THE COURT OF APPEAL.]

HILLYARD *v.* McDONALD AND OTHERS.

Solicitor—Costs of Lease—"Building Lease"—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order under Act, Sched. I., Part II., First Scale, Second Scale; Sched. II.*

Plaintiff demised three-quarters of an acre of agricultural land to the defendants for fourteen years at a rental of 150*l.* a year. The lease contained covenants by the lessees to erect on the land with all reasonable speed a cinema house, the plans to be approved by the lessor, to keep the premises in repair, and at the expiration of the lease, if so required by the lessor, to remove the building; it contained also a proviso that the lessor might purchase the buildings at a valuation, and that if she did not purchase them the lessees might remove them. The lessees agreed to pay the costs of the lessor's solicitors in connection with the lease:—

Held, that the lease was a "building lease reserving rent" within the meaning of the Second Scale in Sched. I., Part II., of the General Order made in pursuance of the Solicitors' Remuneration

Act, 1881, and that the plaintiff's solicitors' costs were taxable under that scale and not under the First Scale in Sched. I., Part II., nor under Sched. II. of the Order.

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APPEAL of the defendants from the decision of Rowlatt J. at the trial of the case without a jury at Birmingham.

The plaintiff claimed two quarterly instalments of rent due in advance for land demised by lease by her to the defendants, and further claimed the plaintiff's solicitors' costs of and incidental to the granting of the lease which had been agreed to be paid by the defendants. The claim as to costs was for a sum of 42*l.* 3*s.* 9*d.* less 12*l.* 8*s.* paid on account, and the defendants pleaded that they had paid the plaintiff the sum of 12*l.* 8*s.*, which included 7*l.* 10*s.* for solicitors' costs as per scale, 1*l.* 15*s.* for stamp duties, and 3*l.* 3*s.* for surveyors' charges, and denied that they were indebted to the plaintiff in respect of any further costs.

The lease, made September 20, 1915, between the plaintiff and the defendants, witnessed that the lessor demised to the lessees "all that piece or parcel of land in the parish of Colburn in the county of the North Riding of York having a frontage to the road leading from Richmond to Catterick of 210 feet and a frontage to the road leading to Hipswell out of the last-mentioned road of 150 feet. . . . . To hold the same unto the lessees for the term of fourteen years less the last day from June 24, 1915, yielding and paying therefor during the said term the yearly rent of 150*l.* . . . ." in advance on the usual quarter days, "the first of such payments to be made on or before the execution of these presents." By the lease the lessees covenanted to pay the rent reserved; to pay all rates, charges, assessments, and outgoings whatsoever imposed in respect of the premises or any buildings to be erected thereon; to erect at their own cost with all reasonable speed a building upon the land to front the line marked building line on the plan, such building to be used by them for the purpose of cinematograph and other entertainments, the plan of such building to be approved to the reasonable satisfaction of the lessor or her agent and to comply with all the requirements of the local authority and of the licensing justices for the division or other the proper authority, "provided that if the military authorities only allow a less permanent form of theatre to be erected then the lessor will deem their requirements in this

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respect as conforming with this covenant"; within six calendar months after the date of the lease at their own cost to remove the then existing quickset hedge and fence and replace it on all sides with a suitable unclimbable fence to the reasonable satisfaction of the lessor or her agent and remove the then existing gate and refix the same to the like satisfaction on neighbouring land of the lessor at a spot to be indicated by her or her agent; during the continuance of the term to keep the said building and fencing and the fixtures, painting and decorations thereof in good, substantial, and complete repair, order and condition; not at any time during the term without the licence in writing of the lessor first obtained to erect or suffer to be erected any new buildings (except the buildings thereinbefore referred to) or make any alteration or addition to any buildings which might be erected on the premises; not to carry on or permit to be carried on or committed on the said premises any trade, business or occupation whatsoever (except the business of a cinematograph theatre), or any nuisance, but to use the same as a cinematograph theatre and for no other purpose, but concerts or other similar entertainments might occasionally be held on the premises; that they would at the expiration or sooner determination of the term, if so requested by the lessor, remove from the said piece of land the building to be erected by them thereon and would reinstate the land in a proper manner; that they would during the term keep the buildings on the land insured against fire in the County Fire Office in the sum of 1500*l.* at the least in the joint names of the lessor and lessees, and whenever required would produce to the lessor the policy and receipt for the last premium in respect of such insurance, and in case of destruction or damage by fire the moneys received in respect of such insurance should be laid out in rebuilding or reinstating the said buildings, and in case of any deficiency the same should be made good by the lessees; proviso that the lessor should be entitled, on giving notice of her intention in that behalf at least one calendar month before the expiration or sooner determination of the term or within fourteen days after the determination thereof by re-entry, to purchase from the lessees all or any part of the buildings erected by the lessees at a valuation to be made by two persons, one to be appointed by each party, or their umpire. And in case the lessor should not agree to purchase

the same it should be lawful for the lessees to remove the said buildings, but not the said fence, at the expiration or sooner determination of the term or within a reasonable time thereafter, in which case the lessees should reinstate the land in a proper manner. Provided always that the lessees should have no claim in respect of tenant rights at the expiration or sooner determination of the lease; proviso that the lessees might, in the event of the camp at Richmond ceasing to be used as a military camp, or in case the said cinema theatre should be placed out of bounds by the military authorities during the continuance of the lease, determine the lease upon giving to the lessor six calendar months' previous notice in writing of their intention so to do, and upon paying the rent and observing and performing the lessees' covenants of the lease up to the day of the expiration of the said notice; proviso that the lease was subject to, and was granted on, the express condition that a cinematograph licence should be obtained within twelve calendar months from the date of the lease, and should such licence not be obtained within that period, or when obtained should subsequently be refused or taken away, the lease should in that event be liable to be determined as in the last proviso. There was also a covenant by the lessees not to assign without the consent of the lessor, and a proviso for re-entry on breach of covenant.

By a letter of July 12, 1915, the defendants agreed to pay the plaintiff's solicitors' costs in relation to the lease.

Rowlatt J. held that the plaintiff's solicitors' costs did not fall either within the First Scale or the Second Scale of Part II. of the First Schedule to the General Order made under the Solicitors' Remuneration Act, 1881, but that they should be taxed under the Second Schedule. (1)

The defendants appealed.

(1) First Scale: "Scale of charges as to leases, or agreements for leases, at rack rent (other than a mining lease, or a lease for building purposes, or agreement for the same)." Second Scale: "Scale of charges as to conveyances in fee, or for any other freehold estate reserving rent, or building leases reserving rent, or other long leases not at rack rent (except mining leases) or agreements for the same respectively."

Sched. II.: "Instructions for drawing and perusing deeds, wills and other documents. Such fees for instructions as, having regard to the care and labour required,

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H. H. Joy, for the appellants. This lease comes naturally within the First Scale of Part II. of the First Schedule; it is a "short lease at a rack rent," and is not "a lease for building purposes" within the exceptions to the First Scale. The building to be erected is clearly of a temporary, rather than of a permanent, character. The lease fails to come within the meaning of the expression "building lease." No building lease ever contemplates the removal by the tenant of the buildings at the end of the term. It does not fall within the Second Scale of Part II. of the First Schedule, for, even if it is a building lease at a rack rent, it is not a "long" building lease, which it must be made in order to satisfy the expression "other long leases." [He cited *Stanford* v. *Roberts* (1), *In re Daniell's Settled Estates* (2), *In re Hogan's Estate* (3), and *In re Kilkenny Corporation*. (4)]

Holman Gregory, K.C. (*McCurdy* with him), for the respondent, having intimated his willingness to accept taxation under the Second Scale of Part II. of the First Schedule instead of under the Second Schedule, was not called upon to argue.

SWINFEN EADY L.J. The principal point for our decision in this appeal arises thus. The plaintiff sued the defendants to recover certain costs payable in respect of a lease granted by the plaintiff to the defendants of a plot of land under three-quarters of an acre in extent near Richmond in Yorkshire; the lease was granted for the purpose of a cinema theatre being built on the land. By agreement the defendants were to pay the costs of the lease, and the question is what costs they are to pay. Are they to be costs within Scale 1 or Scale 2 of Part II. of Sched. I. of the General Order made under the Solicitors' Remuneration Act, 1881, or do they come within Sched. II.? To determine this, regard must be had to the nature of the lease. [His Lordship here examined in detail the lessees' covenants as set out above, and proceeded:] Under what part of the General Order does such a transaction come? The First Scale applies to leases at a rack rent. This lease clearly is such a lease,

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the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. . . . ."

(1) (1884) 26 Ch. D. 155.
(2) [1894] 3 Ch. 503.
(3) [1894] 1 I. R. 503.
(4) [1904] 1 I. R. 570.

for it is a lease at a rental of 150*l.* of a small plot of land which had previously been used only for agricultural purposes; but it is excluded from the First Scale by reason of its being a lease for building purposes, it having been granted for the purpose of a cinema theatre being built on the site. Is it included in the Second Scale, as being "a building lease reserving rent"? The learned judge held that it was not. But in my opinion there can be no doubt that it is "a building lease reserving rent," for it is a lease at a substantial rent with a covenant to build on the land comprised in it. It is said, however, that the effect of the words which follow is to exclude this lease from the Second Scale; they are "or other long leases not at rack rent (except mining leases) or agreements for the same respectively." It is said that the effect of the words "or other long leases" is to confine the operation of the scale to building leases for a long term, and that this lease is not such a lease, being only for the short term of fourteen years. But in my opinion that is not the proper way of reading the clause, which should be read in the following way: It is a scale of charges in respect of "building leases reserving rent," and this is such a lease; "or other long leases not at rack rent," that is to say, other long leases not being building leases. That is, in my opinion, the true construction of these words, which were not intended to restrict building leases to long terms of years; any building lease reserving rent comes within the meaning of the language. For these reasons I am of opinion that the Second Scale of Part II. of the First Schedule is the scale properly applicable, and that the learned judge was wrong in holding that the case came within Sched. II.

BANKES L.J. I quite agree, and have nothing to add as to the construction to be put upon the language of the Scales. I will only add one further observation. Counsel for the appellant suggested that there was a general meaning attached to the expression "building lease," and that this lease did not come within it. I do not agree with that view; every document must be judged by the particular language used in it, and it is to my mind impossible to hold that this is not a building lease.

A. T. LAWRENCE J. I am of the same opinion. It seems to me that the words used are quite wide and are intended to exclude all

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sorts of leases for building purposes from the first Scale; the question remains whether this lease comes within the Second Scale. There is some difficulty arising from the use of the word "other" in the expression "other long leases"; but I think that the true construction is that which my Lord has given to it. A building lease requires just as much care on the part of a solicitor, whether it be for a long or a short period, and it is in my opinion wrong to exclude it from either scale.

Order varied.

Solicitors for appellants: *S. B. Cohen, Dunn & Co., for Freeland & Warder, Birmingham.*

Solicitors for respondent: *Ellis, Peirs & Co.*

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THE KING *v.* GOVERNOR OF LEWES PRISON. *Ex parte* DOYLE.

Army—Field General Court-martial—Power to sit in Camera—Form of Commitment—Rules of Procedure, 1907, *made under Army Act,* 1881 (44 & 45 *Vict. c.* 58), *Third Appendix, Form A—Defence of the Realm Consolidation Act,* 1914 (5 *Geo.* 5, *c.* 8), *s.* 1, *sub-s.* 4—*Defence of the Realm (Amendment) Act,* 1915 (5 *Geo.* 5, *c.* 34), *s.* 1, *sub-ss.* 1, 7—*Proclamation suspending s.* 1 *of Act of* 1915—*Offence committed before Date of Proclamation.*

By s. 1, sub-s. 4, of the Defence of the Realm Consolidation Act, 1914, "For the purpose of the trial of a person for an offence under the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law and had on active service committed an offence under section five of the Army Act."

By the Defence of the Realm (Amendment) Act, 1915, s. 1, sub-s. 1, "Any offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, which is triable by court-martial may, instead of being tried by a court-martial, be tried by a civil court with a jury . . . ."

By sub-s. 7, "In the event of invasion or other special military

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emergency arising out of the present war, His Majesty may by Proclamation forthwith suspend the operation of this section, either generally or as respects any area specified in the Proclamation . . . ."

A British subject was charged with having on April 24, 1916, taken part in an armed rebellion and in the waging of war against His Majesty the King, such act being of such a nature as to be calculated to be prejudicial to the defence of the realm, and being done with the intention and for the purpose of assisting the enemy. On May 5, 1916, he was tried before a field general court-martial convened in Dublin and was convicted.

On April 26, 1916, His Majesty, by Proclamation issued under s. 1, sub-s. 7, of the Defence of the Realm (Amendment) Act, 1915, suspended the operation of that section in Ireland :—

Held, that by virtue of the Proclamation the prisoner became triable by court-martial notwithstanding that the offence with which he was charged had been committed before the date of publication of the Proclamation.

A field general court-martial is only a particular form of a general court-martial.

The prisoner after his conviction was committed to prison, the commitment being in Form A in the Third Appendix to the Rules of Procedure, 1907, made under the Army Act, 1881 :—

Held, that under s. 172 of the Army Act, 1881, sub-ss. 2 and 4 (which provide in effect that any order defective in form shall not be illegal only by reason of any informality or error in it), coupled with r. 133A of the Rules of Procedure, 1907 (which provides that an omission of or deviation from a form shall not render an act or thing invalid), no defect in the form would render the detention in custody of the person under the commitment illegal.

Held, further, that there was nothing on the face of the commitment which showed want of jurisdiction to act under it.

Where a commitment is after conviction, the Court is bound to look at the conviction in order to see whether there is more than a technical defect in the commitment, and a good conviction will cure a defect in the commitment.

Rex v. *Hawkins* (1715) Fortescue, 272, and *Rex* v. *Taylor* (1826) 7 Dow. & Ry. 622 followed.

By clause (*c*) of r. 119 of the Rules of Procedure, 1907, "the proceedings shall be held in open court, in the presence of the accused, except on any deliberation among the members, when the court may be closed" :—

Held, that the words "open court" mean a Court to which the public have a right to be admitted, but they do not include a Court where the public are excluded although the accused and his representatives are allowed to be present.

There is inherent jurisdiction in every Court, including a field

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general court-martial, to exclude the public from a trial if it is necessary for the administration of justice.

Scott v. *Scott* [1913] A. C. 417 followed.

RULE NISI calling upon the respondent, the Governor of Lewes prison, to show cause why a writ of habeas corpus should not issue directed to him to have the body of the applicant, Doyle, before the Court to undergo and receive all and singular such matters and things as this Court then and there consider of concerning him in this behalf.

The applicant Doyle, a plasterer, was taken prisoner in Dublin on April 24, 1916, during the rebellion. He and other rebels occupied a hut, which was attacked by His Majesty's forces, who, after suffering casualties from fire from the hut, captured it, and the applicant and other rebels surrendered.

He was placed in Kilmainham Prison, where he remained until May 1, 1916, when he was removed to Richmond Barracks, Dublin. On May 5, 1916, he was tried in Dublin Barracks before a field general court-martial convened in Dublin, the offence with which he was charged being that he did an act, to wit, did take part in an armed rebellion and in the waging of war against His Majesty the King, such act being of such a nature as to be calculated to be prejudicial to the defence of the realm, and being done with the intention and for the purpose of assisting the enemy. The offence was alleged to have been committed on April 24, 1916, and the applicant was convicted and sentenced to death by being shot. The sentence was subsequently confirmed but commuted to three years' penal servitude. The field general court-martial had been convened by General Sir John Maxwell, Commanding the Forces in Ireland, under reg. 58A of the Defence of the Realm (Consolidated) Regulations, 1914, and s. 49 of the Army Act, 1881.

General Maxwell made an affidavit to the effect that the actual fighting in Dublin had, at the date of the convening of the court-martial, only just been quelled, and the military columns were still operating in various country districts in Ireland, and in the whole country, including Dublin, there was great unrest and possibility of recurrent disturbance. Martial law had been proclaimed in Ireland and was in force. The Proclamation to that effect was, to the best of his recollection, publicly posted over Ireland before

May 1, 1916. Having regard to the considerations above set out he formed the opinion that it was not practicable that the offence should be tried by an ordinary general court-martial, and he, therefore, convened a field general court-martial for the purposes of the case. Being clearly of opinion that, in the existing local conditions, it was necessary for the public safety and for the defence of the realm that neither the public nor the Press should be admitted to the trial, he gave orders accordingly, and the trial took place in camera.

On April 26, 1916, His Majesty, by Proclamation issued under s. 1, sub-s. 7, of the Defence of the Realm (Amendment) Act, 1915, suspended in Ireland the operation of that section.

On May 7 the applicant was removed to Kilmainham Prison, and on May 8 he was moved to a penal servitude prison in Dublin known as Mountjoy Prison, where he remained until May 15, when he was removed to Portland Convict Prison in England, where he was detained until December 20, when he was removed to Lewes Gaol.

The order convening the field general court-martial and the conviction of the applicant were (so far as material) as follows :—

" At Dublin, this 1st day of May, 1916.

" Whereas it appears to me, the undersigned the officer in command of the Forces in Ireland, and a competent military authority under the Defence of the Realm Regulations, that the persons named in the annexed schedule, and being subject to military law, have committed the offences in the said schedule mentioned.

" And I am of opinion that it is not practicable that such offences should be tried by an ordinary general court-martial ; and that the offence is not of a minor character.

" I hereby convene a field general court-martial to try the said persons, and to consist of the officers hereunder named.

" PRESIDENT.

[Name mentioned.]

" MEMBERS.

[Names mentioned.]

" Signed, J. G. Maxwell,

" General Commanding the Forces in Ireland.

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"SCHEDULE.

"Date 1st May, 1916. "No. 19.

Name of alleged Offender.	Offence charged.	Plea.	Finding, and if convicted, Sentence.	How dealt with by Confirming Officer.
19/ Gerald Doyle.	Did an act to wit did take part in an armed rebellion and in the waging of war against His Majesty the King such act being of such a nature as to be calculated to be prejudicial to the defence of the realm and being done with the intention and for the purpose of assisting the enemy.	Not Guilty.	Guilty. Death by being shot. Recommended to mercy as the court consider that he was a dupe.	Confirmed. I commute the sentence to one of 3 years' penal servitude.

"J. G. Maxwell, General.
Convening Officer.

"C. G. Blackader, Brig. Gen.
President."

The commitment under which the applicant was imprisoned was in Form A in the Third Appendix to the Rules of Procedure, 1907, made under the Army Act, 1881 (1), and was as follows :—

" Whereas, Gerald Doyle was by a field general court-martial held at Richmond Barracks, Dublin, convicted of the offence :—That he did an act to wit, did take part in an armed rebellion, and in the waging of war, against His Majesty the King, such act being of such a nature as to be calculated to be prejudicial to the Defence of the Realm, and being done with the intention and for the purpose of assisting the enemy, and by a sentence signed on the 6th day of May 1916 sentenced to suffer death, and such sentence was confirmed by me, as required by law, and was commuted to three years penal servitude, commencing on the aforesaid day,

" Now, therefore, I the undersigned the General Officer Commanding-in-Chief the Forces in Ireland, do hereby in pursuance of the

(1) Vide Manual of Military Law, 6th ed. (1914), p. 707.

Defence of the Realm Acts and the Regulations thereunder and of the several Proclamations of His Majesty King George V. and of the power conferred on me thereunder, and of all other Acts, Proclamations and powers enabling me in this behalf, order that the said convict shall be, as soon as practicable, transferred to a prison in which a prisoner sentenced to penal servitude by a Civil Court in the United Kingdom can be, for the time being confined either permanently or temporarily there to undergo his sentence according to law. And I do hereby in pursuance of the above mentioned Acts and powers order the governor or chief officer of any such prison to whom the convict is brought to receive him into his custody and detain him accordingly, and for so doing this shall be sufficient warrant.

"Signed this 13th day of May, 1916.

"J. G. Maxwell,
"General Commanding-in-Chief
the Forces in Ireland.

The grounds upon which the rule was obtained were (inter alia) that:

(i.) The commitment was bad on the face of it and showed no jurisdiction to commit.

(ii.) The commitment was illegal because there was no power to commit the prisoner to Lewes gaol or to any prison in England.

. . . . . .

(v.) No prison is named in the commitment.

(vi.) The commitment is too vague.

(vii.) The commitment does not show the commission of any offence triable by a field general court-martial or under military law.

(viii.) The conviction was bad because the field-general court-martial heard the case in camera.

(ix.) The conviction was bad because the prisoner was not given notice of his right to be tried before a civil tribunal with a jury.

(x.) The prisoner's right to be tried before a civil Court with a jury has not been taken away by the Proclamation of April 26, 1916, purporting to suspend the operation of s. 1 of the Defence of the Realm (Amendment) Act, 1915, nor by the proclamation of martial law of April 26, 1916.

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(xi.) There was no emergency such as is provided for under s. 1, sub-s. 7, of the Defence of the Realm (Amendment) Act, 1915, and the said Proclamation was ultra vires and unconstitutional.

. . . . . .

(xiii.) The conviction was bad because the offence alleged was not triable by field general court-martial.

(xiv.) The proclamation of martial law of April 26, 1916, was unconstitutional and of no effect.

Sir F. E. Smith, A.-G., Sir Gordon Hewart, S.-G., R. D. Muir, and *Branson* showed cause. Form A of commitment in the Third Appendix to the Rules of Procedure, 1907, made under the Army Act, 1881, is perfectly general and is applicable to a field general court-martial as well as to a general court-martial. There is no special form of commitment prescribed for a field general court-martial. It is expressly laid down that certain irregularities shall not invalidate a commitment. Field general courts-martial are held in times of crises when it is impossible to have such a high degree of formalism as is observed at a general court-martial. The Legislature has plainly shown that it will not allow matters to be concluded by formalism in the case of a general court-martial, and it cannot have intended that a greater degree of formalism should be required at a field general court-martial. A field general court-martial is only a variant of a general court-martial. The forms attached to the Rules of Procedure, 1907, were drafted in times of peace, when the number of field general courts-martial is negligible compared to the number of general courts-martial.

The language of s. 172, sub-s. 3, of the Army Act, 1881, is very comprehensive, and the effect of that section is to give a most complete power of amendment in case of defect or informality in documents provided there is, in the words of sub-s. 2, "a good and valid conviction."

The effect of the Proclamation suspending the right to trial by jury was that from the moment the Proclamation became effective it placed every man within its ambit in precisely the same position as a soldier had theretofore been in. It was thereafter no more necessary in a warrant of commitment to set out the facts in detail than it would have been in the case of any soldier in the Army.

But assuming, without admitting, that it is necessary to set out, in the case of an ordinary soldier in ordinary times, in the warrant of commitment that he is subject to military jurisdiction, the omission to do so is cured by sub-ss. 2 and 3 of s. 172 of the Act of 1881.

Form A merely labels a man as belonging to a certain regiment. It does not show jurisdiction in the sense in which under quite different circumstances, it was held necessary to do so in *In re Peerless.* (1) It is a convenient method of identifying for ordinary purposes the particular person who is to be tried by the court-martial. By his regimental number the man can be quickly and readily identified, and therefore his name alone is not placed in the Form, which commences with the words " Whereas [*Name No. Rank*] of the regiment . . . ."

A commitment after conviction, as in the present case, has always been held to stand in a somewhat different category, for the purpose of habeas corpus, from a commitment before conviction. Sect. 7 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), is not dissimilar from, though it does not go as far as, the provisions of s. 172 of the Army Act, 1881, and under that section a defect in local jurisdiction appearing on the face of an order was amended in *Reg.* v. *Higham.* (2) In *Rex* v. *Hawkins* (3) Parker C.J. said : " There is a difference in the return of a habeas corpus when it is before a conviction and when after one ; for where it is after a conviction, you need not be so particular ; it ought to be alleged unlawfully if before a conviction, but in this case it may be in the conviction, so that will be well enough."

The Court will not, merely upon the ground of an irregularity, issue a writ of habeas corpus after conviction. In *Rex* v. *Taylor* (4) an objection was taken to the warrant of commitment very similar to that in the present case.

If the contention that there was no jurisdiction to hold the field general court-martial in camera were upheld, it would follow that in no circumstances, however secret the matters to be tried might be—whether questions with reference to spies or matters taking place almost in the presence of the enemy,—there would be no power, either under statute or by virtue of the inherent discretion

(1) (1841) 1 Q. B. 143.
(2) (1857) 7 E. & B. 557.
(3) Fortescue, 272.
(4) 7 Dow. & Ry. 622.

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of the Court, to exclude the public from its deliberations. The meaning of r. 119c of the Rules of Procedure, 1907, which provides that "the proceedings shall be held in open court, in the presence of the accused, except on any deliberation among the members, when the court may be closed," is that in ordinary cases the Court is "open" in the sense that the accused, any legal representatives of his, and any persons officially entitled to take part in the proceedings may be present, but that it is "closed" when the members of the Court are deliberating among themselves. For example, the Privy Council is closed when it directs counsel to withdraw in order to consider its judgment, but it is sitting "in open court" when the parties are before it presenting their arguments, whether the case is being tried in camera or not. Sect. 46 of the Matrimonial Causes Act, 1857, upon which *Scott* v. *Scott* (1) was decided, is in similar terms to r. 119c. A similar provision is contained in Order XXXVII., r. 1, of the Rules of the Supreme Court, 1883. If "open court" meant that the public shall be admitted it would follow that no Court could say that the public shall be excluded.

Further, in all cases in which the public interests require it Courts have an inherent jurisdiction to exclude the public. In the affidavit of Sir John Maxwell the words "necessary for the public safety and for the defence of the realm" mean "necessary for the administration of justice." If any violent interruption of the administration of justice took place it would obviously be prejudicial to the defence of the realm. Courts-martial are held under circumstances in which the members comprising the Court are in relation to the commanding officer, in an entirely different position from any of the judges of the High Court in relation to the head of the Bench. No judge takes directions in such matters; but, if members of courts-martial are to be considered as being in the same position as judges of the High Court, they must be presumed to know the powers with which the Court is invested. They assented to or carried out the indication of the view given by the Commander-in-Chief. Knowing they had the inherent power to sit in camera they availed themselves of it, and the fact that a previous direction had proceeded from the Commander-in-Chief does not affect what must be attributed to the Court. It must be assumed that they took the same

(1) [1913] A. C. 417.

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view as General Maxwell. *Scott* v. *Scott* (1) is a stronger case than the present one because the emergency was less grave. The fact that a lady hesitated to speak about delicate matters in an action for nullity is a far less grave consideration than that presented in the present case. If the power is possessed by a branch of the High Court in time of profound peace, it must a fortiori be possessed by a general court-martial, and still more by a field general court-martial.

Even if the court-martial ought not to have sat in camera it is not sufficient reason for the issue of a writ of habeas corpus. It might conceivably give a right of action to a member of the public who had been violently expelled, but has no further effect. [*Ex parte Marais* (2) was also referred to.]

Schiller, K.C., and *Stewart Bevan*, for the applicant. As to the question whether the field general court-martial had any power to sit in camera, the judgment of Viscount Haldane L.C. in *Scott* v. *Scott* (1) shows that, assuming the Court has a discretion, it must sit with open doors unless it can be shown that justice could not be administered except with closed doors. In the present case no such circumstances have been made out. The onus is not upon the applicant to show that there were no circumstances which would warrant the closing of the doors. It is upon the respondent to show that special circumstances justifying the closing of the doors and the exclusion of the public existed. Public safety is not one of the grounds upon which the Court is entitled to exercise its jurisdiction, unless it can be also shown that justice could not otherwise be done. There is no evidence that it in any way exercised its discretion. Sir John Maxwell says in his affidavit that it was done by his orders. It is probable that the members of the court-martial simply obeyed his orders as their superior officer.

The only power to alter the procedure of a court-martial is that given by r. 104 of the Rules of Procedure, 1907, which expressly gives certain powers but omits all reference to the proceedings of a field general court-martial. It was the settled policy of the Army Act, 1881, that matters coming before it should be heard in public. There is therefore no power to try in camera.

The offence having been committed by Doyle on April 24, 1916, the Proclamation of April 26 suspending the right to a civil trial did

(1) [1913] A. C. 417. (2) [1902] A. C. 109, 115.

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not apply, as it was not published, and was therefore not effective till April 27.

The commitment is bad for want of showing jurisdiction. Unless the commitment shows upon the face of it that an offence has been committed within the specified proclaimed area, it shows no power under s. 1, sub-s. 7, of the Defence of the Realm (Amendment) Act, 1915, to try the prisoner by field general court-martial or that the prisoner was subject to military law. The rule upon which Courts have acted with regard to commitments is that they imply nothing against or in their favour but construe them strictly.

Although *Rex* v. *Taylor* (1) appears to show that on an application for a habeas corpus the conviction, if it exists, must be brought before the Court, and if good will cure a defective commitment, it is in conflict on that point with *In re Peerless* (2) and with *In re Allen.* (3) There is no obligation upon the Court to call for the conviction, but if it is before the Court, the Court will look at it in order to cure the warrant of commitment: *Ex parte Tinson.* (4)

In the present case the conviction is open to precisely the same objections as the commitment. There is nothing upon the face of either to show that s. 1 of the Defence of the Realm (Amendment) Act, 1915, had been suspended or that there was a publication of the Proclamation at the date when the court-martial was held and the prisoner convicted. Facts which show the Court has jurisdiction, not conclusions from facts, must be stated. The conviction ought to have recited that the right to civil trial had been suspended by Proclamation in the area in which the applicants had been found guilty of committing the specific offences. The strictest possible rules ought to be applied where, as in a field general court-martial, a prisoner is not a competent witness on oath, has no assistance of any kind, no one to protect his interests, or to take proper objections on his behalf. The recital in the record of the conviction that the prisoner is a person subject to military law is not sufficient to bring him within the jurisdiction of a field general court-martial although it might be sufficient with regard to a general court-martial.

[AVORY J. referred to the Rules of Procedure, 1907, r. 105A.]

(1) 7 Dow. & Ry. 622.
(2) 1 Q. B. 143.
(3) (1860) 3 E. & E. 338.
(4) (1870) 39 L. J. (M.C.) 129.

The object of reg. 58A of the Defence of the Realm Regulations is to retain the power in certain cases only of convening a field general court-martial given by the Army Act, 1881. Rule 133 of the Rules of Procedure, 1907, only means that if there is a form which is applicable it can safely be used, and that merely a deviation is not to render the form invalid. But a form intended for a general court-martial is not applicable to any other form of court-martial. A field general court-martial has a different code with a special set of regulations, and is convened in a way different from a general court-martial. Whatever the reason may be, no form of commitment has been provided in the case of the field general court-martial, and it must therefore comply with the common law requirements.

Sect. 172 of the Army Act, 1881, must be read together with s. 171, and their effect is that if there is an order which can upon the ordinary principles of law be maintained as being valid and proper it is not to be considered invalid merely because it deviates from the form prescribed in the schedule to the Act; but where, as in the present case, the absence of any allegation showing jurisdiction goes to the root of the matter, there is no justification for the detention of the prisoner.

It is not proposed to argue the question as to the validity of the proclamation of martial law if the Court decides against the applicant upon the points already before it, as it is desired to keep that question open.

VISCOUNT READING C.J., having stated the facts, continued: The grounds relied upon by the applicant were in substance that the warrant of commitment and the conviction were or, alternatively one or other was, bad, and that the proceedings were invalid, from any point of view, on the ground that the field general court-martial had heard the case in camera. The last point is the most substantial one, and I will deal with it separately.

It was contended on behalf of the applicant that the commitment is bad on the face of it upon the ground that it does not show jurisdiction in the field general court-martial to commit the prisoner; it does not show that the prisoner was a soldier, nor that the field general court-martial had power to deal with his case. In my view the contentions are not well founded.

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Whatever defects there might be in the warrant of commitment would be cured by the provisions of the Army Act, 1881, and the Rules of Procedure, 1907, made under it coupled with the forms in the Third Appendix to the rules. In my judgment a field general court-martial is only a particular form of general court-martial. It has to be convened in a particular way, and, speaking generally, it is only convened in special circumstances. It is a variant of the general court-martial. At p. 707 of the Manual of Military Law, 6th ed., Form A is stated to be the "Form of Order for Commitment to Prison of Military Convict sentenced in the United Kingdom to Penal Servitude." Prima facie that form is applicable to a general court-martial and, by virtue of the Act of 1881 and the rules made under it, would be used by a general court-martial; and if it had been a general court-martial which had committed the prisoners by this form of commitment it would in my judgment have been clear beyond argument, notwithstanding that there had been any defect in the form, that it could not have invalidated the proceedings. I arrive at that conclusion by reason of s. 172 of the Army Act, 1881, more especially of sub-ss. 2 and 4, where it is enacted in terms that any order which is defective in form "shall not be deemed to be illegal only by reason of any informality or error in or as respects the order, warrant, or other document, or the authority by or in pursuance whereof such convict, or prisoner or soldier was brought into or is detained in such custody." I am prepared to base my decision upon this point upon s. 172 of the statute. Further, r. 133, clauses (A) and (B), of the Rules of Procedure, 1907, which provides that an omission of a form or a deviation from it shall not render any act or thing invalid, is particularly material. It is true that there is not in terms a specific form prescribed for use by the field general court-martial, but I am satisfied that when the Act of 1881 and the rules made under it provide that the particular form of commitment may be used by the general court-martial, and, as in the present case, a field general court-martial uses it varying it according to the particular circumstances of the case, no defect in the form would render it, or the proceedings or the detention in custody of the person under it, illegal.

That is sufficient to determine that part of the case; but, in view of the careful and elaborate argument which has been addressed to

us on behalf of the applicant, I propose to deal with the first point which has been taken, namely, that the warrant of commitment is defective in form. I am not satisfied that it has any defect in form which would render it illegal, or would entitle the person who is in custody to be released. It is necessary to consider the law applicable, so as to understand how it is that the applicant, who is a civilian, came under the jurisdiction of a military authority so as to become a person subject to military law. In my view, when the law is once ascertained and understood, it is apparent that there is no defect in the form of commitment. By the Defence of the Realm Consolidation Act, 1914, it is provided by s. 1, sub-s. 4, that "For the purpose of the trial of a person for an offence under the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law and had on active service committed an offence under s. 5 of the Army Act." That provision was in force from November, 1914, until March, 1915, when the Defence of the Realm (Amendment) Act, 1915, was passed, by s. 1, sub-s. 2, of which it was provided that a person being a British subject who was alleged to have committed an offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, and who was not a person subject to military law or to the Naval Discipline Act, should be entitled within six clear days from the time "when the general nature of the charge is communicated to him to claim to be tried by a civil court with a jury instead of being tried by court-martial, and where such a claim is made" the offence is no longer triable by court-martial. Under sub-s. 7 it is provided that this right of a British subject shall not be available "in the event of invasion or other special military emergency arising out of the present war" if His Majesty has by Proclamation in consequence thereof suspended the operation of the section. Sub-s. 7 means that in case there is invasion, or there are special circumstances and the Royal Proclamation is issued, the right of a British subject to claim trial by jury instead of being tried by a court-martial is suspended.

That being the state of the law, on April 26, 1916, His Majesty issued a Proclamation in Ireland suspending the operation of the right of a British subject to a trial in a civil Court by a jury, and consequently a person, notwithstanding that he was a British subject,

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who had committed an offence in the area specified by the Proclamation lost the benefit of the special right given to him by virtue of the amending Act of 1915 and was triable by court-martial, as he had been by the Act of 1914. That Proclamation was issued in respect of Ireland, and consequently the applicant Doyle, who had committed an offence on April 24, 1916, became triable by court-martial by virtue of the Proclamation which had been published in Dublin and in the rest of Ireland on April 27, 1916. There was, therefore, both the issue and publication of the Proclamation within the specified area before the trial took place. The Proclamation certainly took effect from the time it was published, notwithstanding that the offence had been committed before the date of the Proclamation. The Proclamation deals with procedure—with the mode of trial of the person; and in my judgment it is obvious that, where there was a rebellion, His Majesty had power to issue a Proclamation in such a way as to make the applicant, by virtue of the statute of 1915, triable by court-martial notwithstanding that the offence of taking part in the rebellion had taken place before the Proclamation—which was issued in consequence of the rebellion—had been issued.

By reg. 58A of the Defence of the Realm Regulations it is provided that when there has been such a suspension of the right of trial of a British subject by a civil Court with a jury, then, "notwithstanding anything in regulation 57 a field general court-martial convened by an officer authorised to convene such a court-martial shall have the like jurisdiction to deal with the case as in the last-mentioned regulation is conferred on a general court-martial." There is no doubt that if the law thus set forth applies to the applicant, a field general court-martial had jurisdiction to try him in fact and in law, and it is clear beyond all question, and indeed—except the point raised as to the date of the commission of the offence with which I have already dealt—it is not even contended that there was not jurisdiction to try him. With the exception of that point no complaint is made that upon the facts in evidence the field general court-martial was not, in the circumstances, the proper authority to try him.

But upon his behalf it is contended that upon the face of the documents there is not enough to show that there was juris-

diction to try him. Upon the face of the commitment there is the statement of the offence—i.e., the taking part in an armed rebellion and waging war against the King; then there is the statement—signed as the commitment is by the General Commanding-in-Chief—that the Commander-in-Chief, in pursuance of Defence of the Realm Acts, the Regulations, and the Proclamations, orders that the convict shall be transferred to a prison in which a prisoner sentenced to penal servitude by a civil Court in the United Kingdom can be detained. It appears clear upon the documents before us that the military authorities have by virtue of the statutes the right to order a person committed by them to penal servitude to be transferred to a civil prison in which a prisoner committed by a civil Court to penal servitude would be detained. They did that. By virtue of military orders he was taken to various prisons, transferred from Mountjoy Prison to Portland Convict Prison in England, and from there to the prison at Lewes. There is nothing on the face of these orders which shows want of jurisdiction to do any of those acts. The Court must take notice of the statutes to which I have referred and the Proclamations and Regulations made in pursuance of them. In my judgment there was ample authority to do all these acts.

But, even though we had come to the conclusion that the warrant of commitment was bad on the face of it, as this is a case of commitment after conviction we are again not only entitled but bound to look at the conviction in order to see whether there is more than a mere technical defect in the commitment. Upon behalf of the applicant it has been strenuously contended that we are dealing with the liberty of the subject, but we are also administering law and justice, and we have to see whether or not there is any ground for alleging that the applicant has not been properly convicted and committed. *Rex* v. *Hawkins* (1) and *Rex* v. *Taylor* (2) are authorities which abundantly support the proposition that in considering the validity of the committal the conviction must be looked at. It is clear that the Court in *Rex* v. *Taylor* (2) thought that they ought to look at the conviction, and if they came to the conclusion that there was a defect in the commitment but none in the conviction they would not grant a writ of habeas corpus. When the conviction

(1) Fortescue, 272. (2) 7 Dow. & Ry. 622.

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was brought before them a number of grounds were taken in objection. Upon two grounds the Court held the conviction was bad and consequently the prisoner was illegally detained, and therefore the Court ordered that he should be discharged. Those two authorities clearly support the principle that we are entitled, and I think bound to look at the conviction in the present case, and it is stated on the face of it that Doyle is a person subject to military law. That being so, it establishes that he could be tried by a field general court-martial, and that therefore there is no ground for saying that the conviction is wrong. It would cure any defect (if there were any) in the warrant of commitment, and I come to the conclusion both as regards the warrant of commitment and also as to the form of conviction that the contentions fail.

Upon behalf of the applicant it was further contended that as the trial took place in camera this Court must quash the conviction, or order the discharge of the prisoner, upon the ground that there was no jurisdiction to try him in camera, and, even if there was, that the circumstances necessary to the exercise of that jurisdiction had not arisen and that the trial was therefore illegal and must be treated as void. The argument in the main has rested upon the rules which deal with the powers of a field general court-martial, and particularly upon r. 119 of the Rules of Procedure, 1907, where the distinction is drawn (in clauses (B) and (C)) between a closed court and "open court"; clause (C) provides that "The proceedings shall be held in open court, in the presence of the accused, except on any deliberation among the members, when the court may be closed." It was contended on behalf of the applicant that a field general court-martial is a tribunal constituted by statute and its powers are defined and limited by r. 119, and that under the rule when the Court is not sitting for deliberation (as it was not when the prisoner was tried and convicted) its proceedings must be held in open court, and as they were not all the proceedings are void. On behalf of the respondent it was contended that the words "in open court" are merely used in contradistinction to sitting with closed doors when the Court is deliberating; and that a trial is held "in open court," although the public are excluded from admission to the court, provided that the accused and whoever may be representing him are allowed to be present; and that that is the distinction which

is intended by r. 119, clause (c), of the Rules of Procedure, 1907. I cannot accept that view. I think that the words "in open court" mean in a Court to which the public have a right to be admitted. I see no distinction between the interpretation to be given to these words and those in statutes, dealing with other Courts—for example the Divorce Court, which by s. 46 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), is to sit in open court. It is clear that their Lordships in *Scott* v. *Scott* (1) considered that "open court" meant a Court to which the public has a right of admission; and that seems to me to be the plain, natural, and ordinary meaning of the words, and I cannot accept the argument for the respondent upon that point.

On behalf of the respondent it was further contended that, notwithstanding clause (c) of r. 119, there is inherent jurisdiction in every Court, and therefore in a field general court-martial, to exclude the public if it becomes necessary for the administration of justice; and, although it has been contended on behalf of the applicant that that doctrine cannot apply to a field general court-martial, it is in my judgment plain that inherent jurisdiction exists in any Court which enables it to exclude the public where it becomes necessary in order to administer justice. That is the true meaning of the language used by Earl Loreburn and by Viscount Haldane L.C. in *Scott* v. *Scott*. (1) The general principle enunciated in those judgments is stated in a sentence by Earl Loreburn, who said that, "the Court may be closed or cleared if such a precaution is necessary for the administration of justice." His Lordship went on to state that it was impossible to enumerate all the possible contingencies, but that where the administration of justice would be rendered impracticable by the presence of the public, whether because the case could not be effectively tried or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court, the Court has the power to exclude the public. Those are only instances of the general principle. Applying that principle to the present case, we have the language of Sir John Maxwell, then Commander-in-Chief of His Majesty's Forces in Ireland, to the effect that there had been actual fighting in Dublin which had only just been quelled; that military columns were operating in various

(1) [1913] A. C. 417.

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districts in Ireland, and that there was great unrest and possibility of recurrent disturbance in Ireland including Dublin; that martial law had been proclaimed in Ireland, and was then in force; and that —having regard to these considerations—he formed the opinion that it was not practicable that the offence should be tried by a general court-martial, and he therefore convened a field general court-martial for the purpose of the case. He adds that, being clearly of opinion that, in the existing local conditions, it was necessary for the public safety and for the defence of the realm that neither the public nor the Press should be admitted to the trial, he gave orders accordingly. The Commander-in-Chief having come to that conclusion and having stated it, we must assume that the field general court-martial convened by him, which he was the proper person to convene, and which sat in consequence, held the same view; and, having regard to the language used by him, it seems to be clear that he was of opinion that justice could not be properly—or at least safely—administered in court if the public were admitted. I do not come to the conclusion that he means by the language he uses in his affidavit that, if there had been a trial in court to which the public were admitted, there might have been the possibility of recurring disturbance outside the court. I think he means that if there had been a trial in open court—that is, with the public admitted—in the existing local conditions it would have been unsafe; and in my judgment if it is unsafe for justice to be administered it is equivalent to saying that justice could not in those circumstances be properly administered. In the existence of such a state of circumstances it is quite possible to conceive a number of persons coming into court, if the public had been admitted, who might have terrorized, possibly even have shot, witnesses. Having regard to those conditions, it seems to me abundantly plain that this case was well within the principle as stated in *Scott* v. *Scott* (1), and that consequently there was jurisdiction to try it in camera.

It is not necessary for us to pronounce any opinion upon the proclamation of martial law. It must not be taken that we are implying any doubt as to the validity of the Proclamation, but we only say that it becomes unnecessary to consider whether it was good or bad, and we have not heard counsel for the applicant, who

(1) [1913] A. C. 417.

desired to place arguments on this point before us if we had proposed to pronounce judgment upon it. That becomes unnecessary for the purposes of this case, and we express no opinion upon the point. I have come to the conclusion that the rule must be discharged.

I desire to add that I feel the greater satisfaction in arriving at this conclusion after the elaborate and exhaustive examination into the law that has taken place, because having regard to the material placed before us, the complaints made are merely technical; they are complaints as to the form of documents, except that with regard to the trial in camera; otherwise there is no substance in them. The rule must be discharged.

DARLING J. I am of the same opinion. It appears to me to be incongruous that, before the echoes of this rebellion have died away, we should meet here solemnly to consider such points as have been argued before us. It has been argued that we ought to make an order which would release a man as to whom it is not contended—and no one can suppose—that he was not guilty, that he was not a rebel, or that he was not properly convicted upon evidence of his guilt; yet, if the contentions on his behalf are to prevail, he is to be released because certain forms have not been filled up in a way satisfactory to those who have had ample opportunity for considering how they would have filled them up if they had had time for reflection, and for comparing one form with another, and after reading various statutes and regulations. That is a great part of the case for the applicant, a part with absolutely no merits whatever; and it is most satisfactory to me that we can see our way to hold that the law—even with regard to all those trifles—has not been disregarded, and that everything necessary to comply with legal requirements was done, having regard to the provisions, which are many, that mere slips and deviations or omissions are not to invalidate and render illegal orders which are otherwise good.

There was perhaps more substance in the complaint that the trial of the prisoner took place in camera; that is to say, the court was not open to the public. That is all the complaint comes to. The trial took place in barracks when the rebellion in Ireland was still going on. The ruins in Dublin were still hot cinders, and the whole place was in the condition in which it is described by the fact

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that certain military precautions were taken, and the General in command of His Majesty's forces came to the conclusion that it would not be possible to administer justice if the public of Dublin were to be invited to attend at an open trial of persons with whom, no doubt, a great many of them sympathized. It seems to me that the passages referred to by my Lord from the judgments in *Scott* v. *Scott* (1) are not exhaustive. Earl Loreburn says distinctly that he does not profess to set forth a code of exactly what must be proved before a Court can exercise its inherent right to sit in camera. This must surely be a stronger case than any of those mentioned in *Scott* v. *Scott* (1) that the court-martial which sat to judge the applicant sat when an open rebellion was going on around the court, and at a time when the district—in fact the whole country—in which the trial took place was under martial law; which is equivalent to the suspension of law. It would be grotesque, in circumstances such as those—martial law having been proclaimed—to do what would be equivalent to inviting the public to come and hear witnesses give evidence against rebels with whom a great many of that same public sympathized. It was perfectly notorious that any persons who were recognized as having given evidence might very shortly afterwards have been made to suffer for having assisted to restore law and order. In my judgment the General exercised powers which he was perfectly entitled to exercise, and that he had very good reason for exercising them is shown by the evidence and the documents which have been placed before this Court.

AVORY J. I concur in the judgment of the Lord Chief Justice on every point, and I only wish to add, in case these proceedings should be regarded as an encouragement to persons who have been convicted of indictable offences to apply for writs of habeas corpus, that Lord Campbell C.J. said in *Ex parte Lees* (2) that a writ of habeas corpus "is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law." In my judgment that principle applies where a person has been convicted by a duly constituted court-martial the proceedings of which have been in due course confirmed by the competent authority.

(1) [1913] A. C. 417. (2) (1858) E. B. & E. 828, 836.

ROWLATT J. I agree that the rule ought to be discharged for the reasons given by my Lord Chief Justice.

BAILHACHE J. I am of the same opinion.

ATKIN J. I agree.

SANKEY J. I am of the same opinion.

Rule discharged.

Solicitor for applicant : *G. Gavan Duffy.*
Solicitor for respondent : *Treasury Solicitor.*

NOTE.—Army Act, 1881 (44 & 45 Vict. c. 58), s. 172 (as amended by the Army (Annual) Act, 1885 (48 & 49 Vict. c. 8), s. 7), sub-s. 1 : "Where any order is authorised by this Act to be made by the Army Councils or by the Commander-in-Chief or Adjutant-General of the Forces in India, or by any general or other officer commanding, such order may be signified by an order, instruction, or letter under the hand of any officer authorised to issue orders on behalf of the Army Council . . . . and an order, instruction, or letter purporting to be signed by any officer appearing therein to be so authorised shall be evidence of his being so authorised."

Sub-s. 2 : "The foregoing enactment of this section shall extend to any order or directions issued in pursuance of this Act in relation to a military convict or military prisoner or soldier undergoing detention, and any such order or directions shall not be held void by reason of . . . . any defect in such order or directions, if it be alleged in such order or directions that the convict, or prisoner, or soldier has been convicted, and there is a good and valid conviction to sustain the order or directions."

Sub-s. 3 : "An order in any case if issued in the prescribed form shall be valid, but an order deviating from the prescribed form if otherwise valid shall not be rendered invalid by reason only of such deviation."

Sub-s. 4 : "Where any military convict, or military prisoner, or soldier undergoing detention, is for the time being in custody, whether military or civil, in any place or manner in which he might legally be kept in pursuance of this Act, the custody of such convict, or prisoner, or soldier, shall not be deemed to be illegal only by reason of any informality or error in or as respects the order, warrant, or other document, or the authority by or in pursuance whereof such convict, or prisoner, or soldier was brought into or is detained in such custody, and any such order, warrant, or document may be amended accordingly."

Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1, sub-s. 1 : "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and

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defence of the realm . . . . and may by such regulations authorise the trial by courts-martial . . . . and punishment of persons committing offences against the regulations . . . ."

Sub-s. 4: "For the purpose of the trial of a person for an offence under the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law and had on active service committed an offence under section five of the Army Act . . . ."

Defence of the Realm (Amendment) Act, 1915 (5 Geo. 5, c. 34), s. 1, sub-s. 1: "Any offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, which is triable by court-martial may, instead of being tried by a court-martial, be tried by a civil court with a jury, and when so tried the offence shall be deemed to be a felony punishable with the like punishment as might have been inflicted if the offence had been tried by court-martial."

Sub-s. 2: "Where a person being a British subject but not being a person subject to . . . . military law, is alleged to be guilty of an offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, he shall be entitled, within six clear days from the time when the general nature of the charge is communicated to him to claim to be tried by a civil court with a jury instead of being tried by court-martial, and where such a claim is made in manner provided by regulations under the last-mentioned Act the offence shall not be tried by court-martial."

Sub-s. 7: "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by Proclamation forthwith suspend the operation of this section, either generally or as respects any area specified in the Proclamation, without prejudice, however, to any proceedings under this section which may be then pending in any civil court."

Rules of Procedure, 1907, made under the Army Act, 1881, r. 104: "Where it appears to the officer convening a court-martial, or to the senior officer on the spot, that military exigencies, or the necessities of discipline, render it impossible or inexpedient to observe any of the rules 4 (C), (D) and (E), 5, 8, 13 and 14, he may, by order under his hand, make a declaration to that effect specifying the nature of such exigencies or necessities, and thereupon the trial or other proceeding shall be as valid as if the rule mentioned in the declaration had not been contained herein; and the declaration may be made with respect to any or all of the rules above in this rule mentioned in the case of the same court-martial. Provided that the accused shall have full opportunity of making his defence, and shall be afforded every facility for preparing it which is practicable, having due regard to the said exigencies or necessities."

Rule 105 (A): "A field general court-martial may be convened . . . . (ii.) By the commanding officer of any corps . . . . on active service, or by any officer in immediate command of a body of forces on active service, where it appears to him, on complaint or otherwise, that a person subject to military law has committed an offence."

Rule 119 (c): "The proceedings shall be held in open court, in the presence of the accused, except on any deliberation among the members, when the court may be closed."

Rule 133 (a): "The forms in the appendices to these rules should be followed in all cases in which they are applicable, and when used shall be valid in law, but a deviation from any such form will not, by reason only of such deviation, render any charge, warrant, order, proceedings, or other document invalid. (b) An omission of any such form will not, by reason only of the omission, render any act or thing invalid. (c) The notes to, and instructions in, the forms will be considered as instructions which it is expedient to follow in all cases to which the notes and instructions apply. The Army Council may append to any of the forms when issued for use such further notes as they think fit, and any such notes will be considered as instructions which it is expedient to follow in all cases to which they apply."

Defence of the Realm Regulations, reg. 58A: "Whenever His Majesty by Proclamation suspends the operation of section one of the Defence of the Realm (Amendment) Act, 1915, either generally or as respects any specified area, then, as respects all offences committed against these regulations, or (as the case may be), all such offences committed within the specified area, so much of regulation 56 as relates to trial by a civil court with a jury, and in particular paragraphs (6) to (10) and (13) thereof, shall, so long as the Proclamation remains in force, cease to have effect, without prejudice however to any proceedings under the said section which may be pending at the date of the issue of such Proclamation, and in lieu of the said paragraphs, the following provision shall have effect:—'If it is determined that the case is to be proceeded with and that the offence is not of such a character as aforesaid, the case may be tried by court-martial, and notwithstanding anything in regulation 57 a field general court-martial convened by an officer authorized to convene such a court-martial shall have the like jurisdiction to deal with the case as in the last mentioned regulation is conferred on a general court-martial.'"

J. E. A.

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[IN THE COURT OF APPEAL.]

THOS. W. WARD, LIMITED *v.* MIDLAND RAILWAY COMPANY.

Railway—Rates—Classification of Merchandise—Description of Goods—Jurisdiction of Commissioners—Railway and Canal Traffic Act, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 10.

Sect. 10 of the Railway and Canal Traffic Act, 1888, gives the Railway Commissioners jurisdiction to hear and determine any question or dispute "involving the legality" of any toll, rate, or charge charged, or sought to be charged, for merchandise traffic by a railway company to which the Act applies:—

Held, that the jurisdiction of the Commissioners extends to a case in which, it being admitted that the schedule of charges is proper, the only question is as to the correct classification of the particular goods in respect of which the dispute arises.

APPEAL from a decision of the Railway and Canal Commissioners (Lush J., Hon. A. E. Gathorne-Hardy, and Sir James Woodhouse).

The respondents, Thos. W. Ward & Co., Limited, in the course of their business bought quantities of discarded files and large steel castings such as propeller shafts taken out of broken-up ships which were no longer of use for their original purpose. In dealing with the discarded files the respondents sent consignments of them by the railways of the appellants, the Midland Railway Company, to their warehouses, where they were sorted and a portion of them were exported to foreign countries, where they were used for various purposes. The propeller shafts were cut up and adapted to other engineering uses, such as the making of hydraulic rams. For some time the appellants charged for the carriage of these articles at "B" rates in the classification of goods made under their Rates and Charges Orders Confirmation Acts as being within the description of "scrap" steel therein. In 1909 they began to charge for them at "C" rates, which were higher, as coming within the description of "old files" and "old propeller shafts" therein. "Old files" and "old propeller shafts" were first inserted in the "C" class of the classification in 1908. Before that time they would have been placed either in the "B" class as "scrap" or else in the "2" class as "files" and "propeller shafts." The respondents objected to

these charges and applied to the Commissioners to have the goods charged at "B" rates. The respondents had purchased some consignments of these discarded files from the appellants, who in their tenders had themselves described them as "scrap" steel.

The appellants contended, first, that the goods in question ought to be carried at "C" rates, and, secondly, that the Commissioners had no jurisdiction to determine the question, as it was not one "involving the legality of any toll, rate, or charge" within s. 10 of the Railway and Canal Traffic Act, 1888 (1), the question really in dispute being what was the identity of the articles, that is, whether they were or were not "scrap" steel.

The Commissioners decided that they had jurisdiction to hear and determine the question, and held, upon the evidence, that the goods were properly charged at the rate for "scrap" steel.

The railway company appealed.

Sir J. Simon, K.C., G. J. Talbot, K.C., and *C. H. G. Campbell*, for the appellants. The question in this case is not one "involving the legality of any toll, rate or charge" within s. 10 of the Act. It is rather a question whether certain goods fall within one description or another in the statutory classification of merchandise contained in the schedule to the railway company's Rates and Charges Orders. There is no dispute about the legality of any charge, but there is a dispute as to how the goods ought to be classified. That is not a question for determination by the Commissioners, but by a jury. The point is whether s. 10 upon its true construction is intended to throw upon the Railway and Canal Commissioners the duty of deciding what the identity of a given consignment of merchandise traffic is, or whether it does not mean that where a given consignment of merchandise is identified, but there is a question or dispute involving the legality of the toll, rate, or charge, charged

(1) Sect. 10 of the Railway and Canal Traffic Act, 1888, provides: "Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandize traffic by a company to which this part of this Act applies, the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the Commissioners decide to be legal."

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or sought to be charged for that identified subject-matter, that question alone is to be decided by the Commissioners. It is submitted that the latter is the true construction of the section. Similar questions were involved in the following cases, but the point as to the jurisdiction of the Commissioners was not taken in any of them: *Bovril, Ld. and Virol, Ld.* v. *Great Western Ry. Co.* (1), *Beeston Foundry Co.* v. *Midland Ry. Co.* (2), and *London and North Western Ry. Co.* v. *Society of Motor Manufacturers and Traders.* (3) It is admitted that the discarded files sold by us are "scrap," but if they are afterwards exported for use as files those that are so dealt with cannot be classified as "scrap." The Commissioners had no evidence before them on which they could hold as they did. [They also referred to *Great Western Ry. Co.* v. *Railway Commissioners* (4) and *Davis & Sons* v. *Taff Vale Ry. Co.* (5)]

Rowland Whitehead, K.C., *Holman Gregory, K.C.*, and *E. Clements*, for the respondents, were not called upon to argue as to the question of jurisdiction. Upon the other point they contended that there was ample evidence upon which the Commissioners could come to the conclusion at which they had arrived, and that their finding could not be disturbed.

LORD COZENS-HARDY M.R. This is an appeal by the railway company against an order of the Commissioners made at the instance of a trader. The appeal raises one question of very general importance, namely, as to the extent of the jurisdiction of the Commissioners; and if that point is decided in favour of the jurisdiction of the Commissioners, then the second point is whether there were materials before the Commissioners which enabled them to decide as a question of fact what they did decide.

Originally it was held that the Commissioners or their predecessors, the Railway Commissioners, had no right to decide as to the legality of any toll at all; that that had to be decided in an action at law. But in 1888 a Committee investigated the whole matter in detail, and as a result of the Committee's Report the Railway

(1) (1904) 12 Ry. & Ca. Tr. Cas. 151.
(2) (1910) 14 Ry. & Ca. Tr. Cas. 119.
(3) (1911) 14 Ry. & Ca. Tr. Cas. 294.
(4) (1881) 7 Q. B. D. 182.
(5) [1895] A. C. 542.

and Canal Traffic Act, 1888, was passed. [The Master of the Rolls read s. 10 of the Act and continued :] Now in the present case there was a dispute between the trader and the railway company of this nature : the railway company said : " These articles, in respect of which you are charging or seeking to charge, are not 'scrap' steel or 'scrap' iron within the meaning of the language of the Order ; they are 'files' and 'propeller shafts.'" That being the dispute, the matter came before the Railway Commissioners.

The argument of the railway company is that s. 10 is of no wider application than this : it enables the Commissioners to decide whether the toll, rate, or charge is in excess of the railway company's jurisdiction, and to say whether services have been rendered by the trader in respect of which an allowance ought to be made, or whether there are other considerations in the case which render the charge improper ; but that the section does not extend to any case in which, it being admitted that the schedule of charges is proper, the only question is as to the identity of the goods in respect of which the dispute arose and whether they ought properly to be charged as files or as " scrap " steel or " scrap " iron. Now I cannot read s. 10 in the narrow sense in which the appellants view it. It seems to me that the section clearly applies to a case where the question for decision is whether a legal charge in respect of a particular item has been properly charged against the particular trader who says " The article for which you make that charge is one which does not fall within that description." In my opinion, apart from authority, the jurisdiction of the Commissioners under s. 10 plainly includes a case like the present, and I see no grounds for cutting down its meaning. And this has been the view which has been taken by the Commissioners in every case to which our attention has been called. It is true that the point may have been assumed rather than argued and decided ; but there are some points which are not argued because they are looked upon by counsel as so hopeless that they cannot really be relied upon.

The first case is *Bovril, Ld. and Virol, Ld.* v. *Great Western Ry. Co.* (1), and the question there was whether Virol was an article not specified in the classification, or whether it came under a particular heading in the classification ; and Bigham J., who was then

(1) 12 Ry. & Ca. Tr. Cas. 151, 152.

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the presiding judge dealing with this business, said: "It is said in this case that the question which we have to determine is a question of law. I regard it as a question of fact. The conclusion that we have unanimously arrived at is, that this article is not properly describable as an 'extract' or an 'essence' and that it is in fact better described as a mixture of different component parts. As it does not, therefore, clearly come within the expression used in the new Order, we think that the railway company must carry it as heretofore, under the provisions of class 3, as being an unclassed article." That, of course, is a direct decision on the point, although it is quite true that that point was not taken by counsel in the argument. But it is a decision upon s. 10; it is a decision asserting the jurisdiction of the Commissioners to determine whether or not a particular article does or does not come within one or other of the provisions of the classification. But that is not all, because subsequently the matter arose in two cases before A. T. Lawrence J., who was then the presiding judge of the Railway and Canal Commission. In one case goods were consigned by the description of "bundles of water pipes." That is the case of *Beeston Foundry Co.* v. *Midland Ry. Co.* (1) The goods were really what we now call radiators, and the question came before the Commissioners as to whether they properly came under the description of "bundles of pipes." The judges dealt with that, and they said that if the railway company wanted any modification they must get an additional classification, but they assumed without doubt that they had jurisdiction to decide the point strictly in the manner in which it was decided.

Perhaps the strongest case of all is *London and North Western Ry. Co.* v. *Society of Motor Manufacturers and Traders.* (2) The question was whether a motor chassis was a carriage within the meaning of Part III. of the schedule annexed to the railway company's Rates and Charges Order Confirmation Act, and it was held that it was only a carriage when consigned to the railway company for conveyance, having been propelled to their premises by its own mechanical power or drawn on its own wheels by a locomotive. That is a distinct decision on this very point. I shall not read the judgments of the learned judge and the Commissioners, but it

(1) 14 Ry. & Ca. Tr. Cas. 119. (2) 14 Ry. & Ca. Tr. Cas. 294.

seems to me that they assert and indorse the view that I have taken. The question was whether a chassis drawn in a particular way was or was not a carriage within the schedule, and they made their declaration and enforced it in favour of the traders under s. 10, according to what seems to be the clear meaning of the section. I assume, therefore, that the Commissioners had jurisdiction to decide this matter.

Having dealt with that, I also think that the question of fact is not for this Court, but is for the Commissioners. If there is no evidence upon which the Commissioners could make a finding of fact, then it becomes a question of law, but if they had evidence upon which they could find, it is not for us to interfere; in fact we have no jurisdiction—our jurisdiction is limited to questions of law.

Now what are the facts? They may be divided into two classes; one is the question of what I may call, to use a neutral word, "discarded" files. That is the word used by one of the witnesses, and it is the word used by one of the judges. A vast number of files are used. I was rather struck by the fact that in the Midland Railway Company's list of what they call scrap, amongst files there were twenty-eight tons in one year, apparently from their Derby works alone. The process stated in regard to the files is this: When at an engineering works, such as the Derby works of the Midland Railway Company, any files become no longer fit to be used, they are discarded, and are thrown upon the scrap heap. The scrap heap, consisting of many tons, when it gets very big or unwieldy is then sent away by rail in the shape in which it then is on trucks, and truckloads of files from the heap were sent to Sheffield, where the present traders with whom we have to deal, Messrs. Thos. W. Ward, Limited, carry on a very large business in dealing with matters of this kind.

The first point is this: It was said in the Court below, but not seriously argued here—in fact it was finally abandoned—that these files are not iron or steel "scrap" at all; that they are files; that if they are looked at it will be seen that they are files, and that they are files none the less because they are very much worn. The form of tender issued by the railway company to Messrs. Thos. W. Ward, Limited, for scrap contained an enormous number of different

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articles, both of steel and wire, of every variety of weight and structure, and so on, and amongst those were files to the amount of twenty tons. So it was not a very hopeful contention to say that when they sold to Messrs. Thos. W. Ward, Limited, these twenty tons of discarded files from their works they were not "scrap" steel or "scrap" iron within the meaning of the words. And that has not been pressed here; in fact no claim has been made in respect of it. But then there is a curious process afterwards. Out of the "scrap" files sent by truck to the premises of Messrs. Thos. W. Ward, Limited, a certain proportion was sorted, and certain files of a particular length and of a particular shape were put in different heaps. And it is established that Messrs. Thos. W. Ward, Limited, have orders or specifications, as they are called, sent from the East, mainly from India and China, and sometimes from Japan, for old files which are sent out to the East, in pursuance of such specifications, at an exceedingly cheap price; that is to say, the Eastern customers are ready to take discarded files of this nature when for the purposes of English trade they would be of no value at all. The precise use that is made of them is a little obscure. It is said that in India they are sometimes used for scraping ships' bottoms. It is said that in China they are somehow or other used for knives. I do not myself see how they can be used as knives, but for some reason or other these people are willing to give and do give for them small sums of money—small comparatively with the original value of the files. Messrs. Thos. W. Ward, Limited, say that they are properly described as "scrap" steel because they are no longer useful for the purpose for which they were originally made, and that it is absurd to call them files when nobody would buy them as files to be used for that purpose and when no work has been done upon them; and that the position really is that there is a scrap heap admitted to consist of scrap steel, from which a part is taken and sent away without having anything done to it, and that that part is therefore "scrap" steel. In my opinion there was ample evidence to justify the learned Commissioners in saying that the whole of the scrap heap was scrap steel, and they were not bound to say that it ought to be treated for the purpose of export carriage as "old files." It is not for me to say whether I should have come to the same conclusion, but by that remark it must not be taken that I have any

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doubt on the subject; but, whether I should have doubt or not, I think it is quite clear there was evidence before the Commissioners which justified them in finding as they did, having regard to the trade use of the term, to the commercial description which is well known, and to the application of that commercial usage to the language of the classification. For we must take terms such as we find in the classification with reference to the usage of commercial men who are using the articles. There are a number of words in the classification which to me convey no idea whatever. Our attention has been called to some of them, but you must in a case like this allow years of commercial usage to explain the sense in which in the world of commerce the words are found and are used. In my opinion therefore, as to the files, there is no ground whatever for interfering.

Then the other matter is this: There is no export trade in the second case. It deals with propeller shafts, which are taken out of ships when they are broken up. A photograph was used in the case depicting a part of a shaft taken from the *Majestic*. I do not know the total length of the shaft, but I think counsel assented rather to the view that originally this shaft was about 150 feet long. It is made up of sections, and the sections differ in size. These sections have to be taken apart and divided, frequently by the aid of dynamite. They can never be used again as shafting on a ship; that is quite clear on the evidence. But it is said that if you were so minded you might take a section of the shaft and you might by great ingenuity and at great expense possibly apply and use it for the purpose of making a hydraulic ram. That is not an ordinary commercial use of it; no one in his senses would do that except possibly in a particular instance at a time when it might be extremely difficult to get proper new materials for the purpose required. In my opinion there was evidence which justified the Commissioners in saying that this section of shaft, whether you take it as depicted in the photograph or in a still further broken-up shape, was within the meaning of trade usage "scrap" steel and was not shafting within the meaning of the classification. That being so, it seems to me that we cannot possibly interfere; it is a question of fact upon which the Commissioners have given their decision. It is not for us to say whether they were right or wrong in that; but again it must not be

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assumed that I have any doubt as to the accuracy of their decision.

In my opinion the appeal fails, and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The first question arises as to whether the Commissioners had jurisdiction to entertain and determine the question that came before them. The jurisdiction depends on the 10th section of the Railway and Canal Traffic Act of 1888, which is in these terms : [The Lord Justice read the section and continued :] In this particular case the railway company seek to charge the trader, who has made the application to the Commissioners, a certain rate for two particular species of merchandise traffic—in the one case for discarded steel files (I am using the word "discarded" as a neutral term) bought and sold and dealt in by the trader, and in the other case propeller shafts, or the sections thereof, taken from steamships, and also bought and dealt in by the trader. The trader denies the right of the railway company to make the charge they seek to make and says that the only charge they are entitled to make is a lower one. That seems to me in plain terms to raise a question or dispute involving the legality of the charge which the railway company is seeking to make within the plain terms of the section. It is contended on behalf of the railway company that the jurisdiction only arises when the question is as to the legality of the charge which the railway company enter in their list of charges as those which they propose to make in connection with the classes of goods described therein, and does not extend to enable the Commissioners to determine a question between the railway company and the traders as to the concrete instances of goods which may or may not come within those descriptions. In my opinion there is nothing in the section to limit the jurisdiction of the Commissioners in the way for which the appellants contend.

The case is not directly covered by authority, but there are three cases which have been referred to by the Master of the Rolls in which questions almost the same as that raised in the present case arose between traders and railway companies ; and in no one of those three cases was it so much as suggested that the Commissioners had not jurisdiction to try the question. In the third of

them, *London and North Western Ry. Co.* v. *Society of Motor Manufacturers and Traders* (1), the question was, I think, precisely the same. It was a question whether the company were entitled to charge a rate for a motor chassis as for a carriage, or on some other footing. I think that is exactly the kind of question we have to determine; and it does not seem to have occurred either to counsel or to the judge or to the other two Commissioners that there was any question but that the dispute was one which the Commissioners had jurisdiction to determine. So far as that part of the case is concerned I think the order of the Commissioners was right and must be affirmed.

Then the substantial question apart from jurisdiction is whether discarded steel files are, according to the true construction of the Confirmation Act of 1891, to be charged under class B as "scrap" iron or steel carried in a minimum load of four tons per truck, or whether they ought to be charged at a rate under class 2 as "files or rasps iron or steel" with this modification, that the particular railway company have consented since 1909 to place them in class C if they are "old files"—that is, at a lower rate than they would be entitled to under class 2. That, of course, is a question of construction, but it is only a question which can be determined when you have ascertained the meaning in a commercial sense of the terms which are used, because these Rates and Charges Orders represent in fact the settlement of questions between the railway companies and traders, and a Court asked to interpret such a document must know the sense in which the railway companies and the traders use what are in fact technical terms.

Now in the case of these files it seems to me there was abundant evidence before the Commissioners to justify them in the conclusion of fact to which they came, that there was a trade designation for such things, and that the trade designation brought them under the description of "scrap" iron or steel. Then of course, that being so, the construction of the classification follows as a matter of course. From the decision on the point of fact there is no appeal to this Court if there is evidence on which the Commissioners could properly act. I think there was, and I think, therefore, that their decision so far as the files are concerned is one which must stand. But with regard

(1) 14 Ry. & Ca. Tr. Cas. 294.

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to that I should like to add this: It is admitted that the heap of files carried by the railway company from the works where they are discarded to the premises of Messrs. Thos. W. Ward, Limited, must be treated as in a commercial sense "scrap" steel, and for the simple reason that the railway company so treat it themselves in the tender they make to the merchants for the purchase of these things. Now those which are exported are merely part of that which has been brought to the traders' storehouses, and which admittedly must be treated as "scrap" steel; I fail to see any distinction between the files mixed up with others and the files separated from those others and sold by themselves. Nothing has been done to them; they remain in exactly the same condition except that a certain amount of rust and dirt and so forth has been knocked off, but nothing has been done to them; they are the same things as have been brought into the storehouses of Messrs. Thos. W. Ward, Limited, and admittedly properly charged as "scrap" steel.

The second species of merchandise as to which the question arises are propeller shafts—or, more accurately, the separate sections of propeller shafts—taken from discarded ships by Messrs. Thos. W. Ward, Limited, who act in this respect as ship-breakers; that is to say, they are masses of steel originally intended for and used as sections of the propeller shafting of a steamer, but now mere masses of steel no longer capable of being used for that purpose, but possibly capable of being used, after a considerable amount of work has been done upon them, as materials for the construction of some other form of machinery. There again it seems to me there was ample evidence upon which the Commissioners could come to the conclusion that in a commercial sense these things are included in the description of "scrap" steel.

Having come to that conclusion, it seems to me that the decision of the Commissioners was right and must be affirmed.

SCRUTTON L.J. This is an appeal from the Commissioners to the Court of Appeal, and by s. 17 of the Railway and Canal Traffic Act of 1888 no appeal is allowed from the Commissioners upon a question of fact. We are therefore limited to finding whether there are any questions of law which are brought before us. The first question

brought before us is clearly a question of law. The railway company say the Commissioners had no jurisdiction under their Act to deal with the question which was before them. The question was this: Messrs. Thos. W. Ward, Limited, had presented certain merchandise for carriage on which they were charged by the railway company certain rates, and Messrs. Thos. W. Ward, Limited, said that those rates were rates which the railway company had no power to charge. Now whether the Commissioners had jurisdiction to deal with that complaint depends on s. 10 of the Railway and Canal Traffic Act of 1888. As I understand the argument of the railway company, they say the legality of a charge means the abstract legality of the charge for an article without reference to any particular article or any particular carriage. They say that it would be possible for the Commissioners to decide whether for "scrap" a certain rate should be charged, but impossible for them to decide whether Jones ought to pay for a particular truck a rate for scrap or a rate for something else. Now I cannot find any trace of that limitation in the section itself, and I think I find traces, or more than traces, which satisfy me that the intention of Parliament was not to limit the words in that way. For the section provides that "the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge," and by s. 12 they may "award to any complaining party who is aggrieved such damages as they find him to have sustained; . . . . including repayment of overcharges." Now the Commissioners cannot possibly enforce a toll or give damages to a complaining party in respect of an overcharge unless they find out what is the particular article which that particular party has tendered for carriage, and in respect of which he has been overcharged; and it appears to me, therefore, clear that the Commissioners had jurisdiction to deal with this matter, a jurisdiction which in fact they had exercised without the point being argued in the three cases which were referred to by the Master of the Rolls.

The next question is: Is there any question of law in respect to the Commissioners' decision that certain consignments were to be charged certain rates? It is said, first of all, that there is a question of law because this is a question of the construction of the statute. The Midland Railway Company's Act gives them power to charge

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rates not exceeding a maximum which is named in the schedule, and gives a classification with various maxima for various classes, and it is said that the Commissioners here are dealing with a question of the construction of the Act and schedule. When one looks at the schedule in question it seems to be quite impossible for the Court to construe all its words. It contains words which are quite unknown to ordinary members of the public. If the Court is asked what is "swarf," or what is "slummage," or what are "spetches," or what is "valonia," they would not know. One of the members of the Court happens to know what "valonia" is, because he had a case about it. But what is "diatomite," and what are a number of other articles named in the list? It is quite obvious the Court must have trade evidence before them to show what articles are referred to, and it is quite obvious that what the Commissioners had to deal with in this case was whether the articles consigned were steel or "scrap." The Court by the light of nature does not know what "scrap" is; it has to hear from the trade what is commonly treated as "scrap" in the trade, and it is open both to the trader and to the railway company to call evidence to satisfy the Court as to the commercial meaning of the word "scrap," or of any other word used in the classification. In this case the railway company must say that there was no evidence on which the Railway Commissioners could find as they have done that these consignments came within the word "scrap."

I am not going through the matters that have been referred to by my learned brothers. I have looked at the evidence very carefully, directing my attention to the points to which counsel for the appellants directed us, and I am quite clear there was evidence both as to the files and as to the propeller shafts upon which it was open to the Commissioners to find, as they did, that in the ordinary trade meaning of the terms the things that had once been files and the thing that had once been a propeller shaft were in the trade meaning, particularly as used by the Midland Railway themselves, "scrap" within the meaning of the classification.

For these reasons, without expressing any opinion whether I should have decided the case in the same way, but, equally with the Master of the Rolls, not hinting any doubt as to the decision of the Commissioners—it is not for me to decide whether they were right

in fact—I think there was evidence upon which they could come to the conclusion of fact to which they came.

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Appeal dismissed.

Solicitors for appellants : *Beale & Co.*

Solicitors for respondents : *Neish, Howell & Haldane.*

G. A. S.

GOLDSTEIN *v.* SALVATION ARMY ASSURANCE SOCIETY.

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Insurance, Life—Insurable Interest—Funeral Expenses—Tombstone—Recovery of Premiums—Misstatement of Fact—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 36, *sub-s.* 1.

By s. 36, sub-s. 1, of the Assurance Companies Act, 1909, among the purposes for which collecting societies may issue policies of assurance there is included insuring money to be paid for the funeral expenses of a parent :—

Held, that the funeral expenses must be reasonable, regard being had to all the circumstances of the case in question.

The plaintiff effected an insurance with the defendants on the life of his mother for the purpose of providing money to be paid for her funeral expenses. Among the funeral expenses which he alleged he had incurred was a sum of 16*l.* 8*s.* 9*d.* for a tombstone. Part of these expenses having been paid by other societies, he claimed the balance of 14*l.* 16*s.* from the defendants :—

Held, that funeral expenses could not be taken as matter of law to exclude the cost of a tombstone, and that whether in a particular case they properly included such an item was a question of fact.

The plaintiff alternatively claimed a return of the premiums paid on the policy :—

Held, that there were no circumstances entitling him to recover them.

Harse v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558 followed.

APPEAL from the City of London Court.

The action was brought to recover 14*l.* 16*s.* under a policy of insurance entered into between the plaintiff and the defendants on April 15, 1912, upon the life of the plaintiff's mother, Sarah Goldstein, who died on May 19, 1916. Alternatively the plaintiff claimed a return of 7*l.* 2*s.*, the amount of premiums paid on the policy. The policy recited that a proposal had been made by the plaintiff to

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" effect an insurance on the life of the assured, Sarah Goldstein, for the purpose of providing money to be paid for the funeral expenses of the assured " (1), and witnessed that the defendants agreed that if the plaintiff should on the dates named pay to the defendants the premiums mentioned in the schedule, then upon proof being given to the reasonable satisfaction of the defendants' directors of the death of the assured the defendants would pay the sum assured to the plaintiff. The policy was subject to the conditions indorsed upon it, and it was to become void and all premiums paid thereon were to be forfeited if any of the conditions indorsed should not have been performed and observed. One of the conditions was that the plaintiff should have truly answered all questions contained in the proposal forming the basis of the assurance and should not have suppressed or concealed any material fact touching the age of the assured.

The plaintiff's mother was a Polish Jewess who had emigrated from Russia to this country. The plaintiff had maintained her for several years. He had insured her life in various insurance societies, and had made inconsistent statements as to her age in the proposal forms upon which the insurances were effected. In the proposal form which led to the policy in question her age was stated as of sixty-two years. The plaintiff alleged that he had spent 53*l.* 16*s.* on her funeral expenses. This sum included 16*l.* 8*s.* 9*d.* for a tombstone. He had received from the other societies a sum of 39*l.* He claimed 14*l.* 16*s.*, the difference between 53*l.* 16*s.* and 39*l.*

The county court judge gave judgment for the plaintiff.

The defendants appealed.

Fortune, for the appellants. Unless the respondent can show that " funeral expenses " mentioned in s. 36, sub-s. 1, of the Assurance Companies Act, 1909, include the cost of a tombstone he cannot succeed in his claim: *Harse* v. *Pearl Life Assurance Co.* (2) A tombstone plays no part in the funeral ceremony. Its cost would

(1) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36, sub-s. 1: " Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister . . . ."

(2) [1904] 1 K. B. 558.

not be included in the " reasonable funeral expenses " which, under s. 7 of the Finance Act, 1894 (57 & 58 Vict. c. 30), may be deducted in ascertaining the value of an estate for the purpose of estate duty : see Hanson's Death Duties, 6th ed., p. 149.

Furthermore, some limitation must be placed upon the words " funeral expenses " in the Assurance Companies Act, 1909. They could not include the expense of erecting a memorial, such as a chapel. The cost of flowers to be placed upon the grave, or of mourning apparel to be worn by relatives, could not be the subject of a policy under the Act. The expenses must be reasonable. In the present case the respondent has already recovered 39*l.* in respect of funeral expenses. He cannot recover that sum over again : *Wolenberg* v. *Royal Co-operative Collecting Society.* (1) Anything beyond that amount would be unreasonable, even if it had been actually paid, as to which there is no finding. The county court judge paid less heed to this contention than to the evidence that the respondent had maintained his mother for several years.

The age of the respondent's mother having been misstated, the policy is void.

David White, for the respondent. It cannot be asserted as matter of law that a tombstone is or is not a reasonable subject of funeral expenses. The question is one of fact for the tribunal of first instance, whose decision will not be overruled. If the expense of the tombstone cannot be recovered, the respondent is entitled to a return of the premiums paid. There is no evidence that the age of the assured has been misstated.

Fortune in reply.

ROWLATT J. In this case it has been said that the defendants were entitled to judgment, in the first place because there was a misstatement of age in the proposal. The correct statement of the age was made a condition of the contract, and if the age was wrongly stated the defendants are entitled to succeed. But was it wrongly stated ? The learned judge has found that it was not. When a person fills in a declaration of age such as this, he does not undertake to prove it in an action at law. This plaintiff could probably never have proved it by legal evidence, his mother, who was a Polish

(1) (1915) 112 L. T. 1036.

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Jewess, having emigrated into this country from Russia. If the defendants seek to avoid liability they must prove the age to have been misstated. Here they do show that the plaintiff has made contradictory statements about his mother's age. The effect, if any, of these contradictions is to make any statement by the plaintiff as to his mother's age of extremely little value, but it does not prove that when on a particular occasion he stated her age as of sixty-two years in 1912 he then stated the age falsely. Therefore I think the defendants fail to make good that defence.

Then comes the main question founded upon the peculiar nature of this policy. It was issued under s. 36, sub-s. 1, of the Assurance Companies Act, 1909, which includes, among the purposes for which collecting societies and industrial assurance companies may issue policies, money to be paid for funeral expenses of, among others, a parent. The effect of that enactment is not to create a new insurable interest. The section does not enable a person to insure the amount he may pay for funeral expenses and then to come forward as a creditor and claim the amount he has expended, whatever that may be. It enables him to assure that particular disbursement which he apprehends as a matter of moral obligation he may have to make. Therefore it falls to the tribunal before whom the claim is preferred when the death happens to inquire what that amount is. What occurs if the funeral expenses are insured several times over it is not necessary and not easy to determine. Of course if persons were allowed to recover irrespectively of other insurances a great temptation would be offered them to insure against the death of their parents under the pretext of funeral expenses. If they do the insurance company can raise the point. For the present purpose it is enough to say that it has been decided in *Wolenberg* v. *Royal Co-operative Collecting Society* (1) that if at the time of action the plaintiff has already recovered under other policies the full amount of the funeral expenses paid by him, then no further amount can be recovered under another policy. In the present case the plaintiff, in order to escape the effect of that case, must prove that 53*l.* 16*s.* has been spent in funeral expenses which are proper and reasonable, because there must be some sort of limit. Now the plaintiff's

(1) 112 L. T. 1036.

estimate of 53*l.* 16*s.*, which he has vouched up to 40*l.* 14*s.* 9*d.*, includes a sum of 16*l.* 8*s.* 9*d.* for a tombstone. Mr. Fortune, for the defendants, contends that the money expended upon a tombstone is as a matter of law incapable of being included under funeral expenses within the meaning of this section. It is a well-known and inveterate practice acquiesced in by everybody that a tombstone, like mourning, is not allowed as part of the funeral expenses which are deducted in estimating estate duty. But I do not think that such considerations help us much in a case like this. One must look at the object of this statute, which was to enable people to secure by insurance money wherewith to fulfil what is really a sentimental obligation. I think the enactment ought to be construed with some latitude. Undoubtedly it could not be said as a matter of law that the erecting of a memorial in the shape of a church or a chapel, or the founding of a bed in a hospital, or even wearing mourning, was part of the funeral expenses; but the memorial upon a grave may be the completion and identification of the grave itself, and, while I do not say that in every case a tombstone must be part of the funeral expenses, I do not say as a matter of law that it is not. We have no jurisdiction to review the finding in this case upon the facts, and I think in every case the learned judge must consider whether a tombstone is reasonable under all the circumstances or not. Speaking for myself, I should say that prima facie 50*l.* is a very large sum to spend on a funeral; but the learned judge has said that among Jews a very large measure is to be allowed. He has allowed the expense of the tombstone, and seems to think that 53*l.* 16*s.* is not too much to spend on this funeral. Whether or not I should have come to the same conclusion is immaterial. But I cannot find that the learned judge has stated anywhere in his judgment that expenses to the amount of 53*l.* 16*s.* have been incurred in fact. This omission may be due to misreporting. As reported he seems to have given weight to another consideration, namely, that the plaintiff had been supporting his mother for a great many years. As to that, I need only say that past maintenance cannot be recovered under a policy for funeral expenses. Money spent in keeping a relative alive is no part of the expenses of burying him. This element must be excluded altogether. In these circumstances, as there is no finding that 53*l.* 16*s.*

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has been expended, there must be a new trial to ascertain how much has actually been expended.

Then as to the question of the return of the premium. The premium is returnable by the insurer if he has not been on the risk; it is returned on the footing of money paid for a consideration which has entirely failed. In this case it cannot be said that these defendants were never on the risk in that sense, because no one could tell until the death occurred what outstanding policies were alive. The premium was not recovered in *Wolenberg's Case* (1), and I can see no ground for saying that it is recoverable in this case. In my opinion there must be a new trial if the defendants desire it; if not, the appeal is dismissed.

McCARDIE J. I agree. I need add nothing on the point as to the statement of the age of the assured.

I am clear that no cause has been shown here for a return of the premiums by the defendants. In my view the point is covered by *Harse* v. *Pearl Life Assurance Co.* (2) and by *Wolenberg's Case.* (1) In *Harse* v. *Pearl Life Assurance Co.* (2) the Divisional Court accepted the view that the agent of the defendants must be taken to be a skilled person, and that if such a skilled person told the plaintiff, although without fraud, that the policy was valid, then the plaintiff could recover his premiums if it turned out that the policy was illegal. That proposition was negatived by the Court of Appeal, who held that the plaintiff must submit to his loss of premiums unless there could be introduced the element of fraud, duress, oppression, or such a difference in the position of the parties as to create a fiduciary relationship towards the plaintiff. In the view of that Court the fact that the defendants' agent might have some knowledge of insurance law while the plaintiff was an ignorant person did not establish a fiduciary relationship between the parties. In the present case there is nothing which brings the plaintiff within any of the exceptions mentioned in *Harse* v. *Pearl Life Assurance Co.* (2) No representation at all was made to the plaintiff. His only complaint was that the defendants never explained to him that he should only insure for funeral expenses—an objection which has no

(1) 112 L. T. 1036.
(2) [1903] 2 K. B. 92; [1904] 1 K. B 558.

force, inasmuch as it appears clearly upon the face of the proposal form that he was about to insure for the purpose of providing funeral expenses. I am clear, therefore, that no ground here exists for the return of the premiums to the plaintiff.

As to the argument that the plaintiff had an insurable interest, apart from funeral expenses, in the life of his mother, that proposition is erroneous in principle, and it is further negatived by the decision of the Court of Appeal in *Harse* v. *Pearl Life Assurance Co.* (1)

Then the point arises as to the validity of the policy by virtue of s. 36 of the Act of 1909. I need not repeat the section. The policy to be valid must be made for the funeral expenses of the relatives indicated. The phrase "funeral expenses" seems to me to be somewhat elastic. The meaning may vary with the context in which the phrase is used. It has been held in the case of *Bridge* v. *Brown* (2) that the cost of a tombstone is not a funeral expense. It seems also to have been held in *Johnson* v. *Baker* (3) that money spent on mourning supplied to the widow was not a funeral expense. But both those decisions had relation to facts and circumstances different from those existing in the present case. I agree with my learned brother that s. 36 must be interpreted so as to effect the object of the Legislature, which was to enable poor people by means of insurance to provide decent funeral arrangements which otherwise they could not themselves supply. I need not attempt an enumeration of funeral expenses, but I think it was quite open to the learned judge to find that the cost of an ordinary stone or tablet upon the grave containing the body of the dead is a funeral expense within s. 36. In my view the learned judge who tries a case of this sort should not unduly extend the operation of the section. He must remember the station in life, the occupation, and the creed of the dead person, and the general circumstances of the case, and he ought not to allow as a funeral expense anything beyond these reasonable and proper limits. Any undue expense or extravagance should be struck out from the list of expenses tendered by a plaintiff claiming under this section; for it is obvious that, unless the limitation of reasonableness be imposed, this section will prove a source of gross abuses.

(1) [1904] 1 K. B. 558. (2) (1843) 2 Y. & C. Ch. 181.
(3) (1825) 2 C. & P. 207.

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Whether in the present case a tombstone is a reasonable item of expense is a question of fact for the learned judge to determine, and, when he deals with the new trial, he ought to remember that the policy is a mere indemnity policy. I agree that the sum of over 50*l.*, which was put forward by the plaintiff as the expenses appropriate to the burial of his mother, is a sum so large as to justify the learned judge in making a full and critical inquiry into the facts and items and the payments in the other cases. I agree that there should be a new trial for the reasons given by my learned brother.

Appeal allowed.

Solicitors for appellants : *Ranger, Burton & Frost.*
Solicitors for respondent : *S. A. Clench & Co.*

W. H. G.

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[IN THE COURT OF APPEAL.]

MEGUERDITCHIAN *v.* LIGHTBOUND AND OTHERS.

[1915 M. 786A.]

Solicitor—Lien—Documents obtained by Negotiation without Litigation—Bankruptcy—Trustee—Documents in Solicitor's Hands after Bankruptcy.

The defendants, a firm of solicitors, were instructed by Z. to obtain the restitution by B. of certain documents, and took various steps with that object. Z. became bankrupt, and the plaintiff was appointed receiver in the bankruptcy. He then instructed the defendants to take steps to obtain the documents, and eventually as the result of negotiations conducted by them, an agreement was made between the plaintiff and the representatives of B., who had in the meantime died, under which the documents were handed to the defendants as the plaintiff's solicitors. The defendants claimed a lien on them for all their costs arising from the attempts to recover them as from the time of the instructions given them by Z., claiming that the documents were the fruits of their exertions. The plaintiff admitted his liability for costs incurred on his instructions, and paid money into Court to satisfy those costs, and claimed the return of the documents :—

Held, (1.) that no lien exists on the fruits of a mere negotiation without litigation ; and (2.) that in any case the possession of the documents by the defendants was obtained as the result of the fresh

instructions given by the plaintiff and was not attributable to anything done on the instructions of Z., and that, therefore, no lien on them existed in respect of the costs incurred on Z.'s instructions.

Decision of Rowlatt J. [1917] 1 K. B. 297 affirmed.

APPEAL from the decision of Rowlatt J. in an action tried with a jury; reported [1917] 1 K. B. 297.

The plaintiff, as surviving trustee in bankruptcy of the estate of one Zervudachi, claimed the delivery up of certain documents from the defendants, Lightbound, Owen & MacIver, a firm of solicitors, or damages for their detention or conversion. The defendants set up a right of lien over these documents for their costs.

In August, 1906, Zervudachi obtained a transfer to him of concessions of certain asphalte mines by the Ottoman Government which entitled him to 70 per cent. of the total holding, one Shakour Pasha holding the remaining 30 per cent. Rowlatt J. held that the share of Shakour was an equitable one only, and he did not appear as a principal in any of the transactions. On September 24 Zervudachi made an agreement with a financier named Bergheim whereby the latter was to purchase the mines and promote a company to work them; and for this purpose the documents relating to the concessions, which were the documents in question, were handed over to Bergheim. Bergheim did not fulfil his bargain, and Zervudachi, on October 20, 1909, obtained judgment for damages against him in the Egyptian Courts; but the documents were not handed over by Bergheim. Zervudachi was advised that this judgment was not enforceable in this country, and accordingly, in April, 1910, he instructed the defendants to obtain the documents from Bergheim. A representative of the firm went to Egypt and collected evidence to support the claim, and a draft writ was prepared. In November, 1911, Zervudachi became bankrupt under the Egyptian law, and the plaintiff and two others were appointed syndics (receivers in bankruptcy), the plaintiff alone now remaining. On February 17, 1912, the syndics instructed the defendants by letter as follows:

We the undersigned syndics of Mr. Zervudachi, actually (1) bankrupt, beg to charge you to introduce as soon as possible a claim

(1) Presumably representing the French *actuellement*, which means not "actually" but "at present."—F. P.

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against Mr. Bergheim for undue confiscation of documents which had been delivered to him by Mr. Zervudachi. The fact that Mr. Bergheim has arbitrarily confiscated the said documents has been undoubtedly one of the chief causes of Mr. Zervudachi's bankruptcy. He was reduced to absolute incapacity not having the documents at his disposal. And now, after Mr. Zervudachi's bankruptcy, we find ourselves in precisely the same difficulties. At least three different groups have applied to us with the object to buy the asphalte concessions, but in default of documents we are not in a position to negotiate. . . . . We shall shortly forward you all written evidence in support of our claim." The defendants accordingly entered into negotiations with Bergheim, who shortly afterwards, in September, 1912, was killed in an accident. Eventually on May 30, 1913, an agreement was made between the personal representatives of Bergheim and the syndics whereby the documents were handed over to the defendants, as the syndic's solicitors, in consideration of 300*l.* and the abandonment of all further claims against Bergheim's estate. The defendants then sent in their bill of costs to the plaintiff covering all the work done by them in relation to the recovery of the documents since they were first instructed by Zervudachi. The plaintiff contended that he was only liable for the costs incurred as from the time the syndics instructed the defendants, and that the defendants must prove in the bankruptcy of Zervudachi for the rest; and he paid money into Court in respect of his admitted indebtedness. The defendants refused to deliver up the documents, claiming a lien upon them in respect of the whole of the above costs.

Rowlatt J. held (1.) that no lien existed on the fruits of a mere negotiation without litigation; and (2.) that in any case the possession of the documents by the defendants was obtained as the result of the fresh instructions given by the plaintiff and was not attributable to anything done on the instructions of Zervudachi, and that, therefore, no lien on them existed in respect of the costs incurred on Zervudachi's instructions.

The defendants appealed.

Leslie Scott, K.C. (*L. F. C. Darby* with him), for the defendants. [The argument was the same as in the Court below, and does not

need repetition here. The following cases were cited: *In re Meter Cabs, Ld.* (1); *Read* v. *Dupper* (2); *Ormerod* v. *Tate* (3); *Ross* v. *Buxton* (4); *Shaw* v. *Neale* (5); *In re Moss.* (6)]

E. M. Pollock, K.C., and *Eustace Hills*, for the plaintiff, were not called upon to argue.

SWINFEN EADY L.J. This is an appeal from the judgment of Rowlatt J., who tried the case without a jury. The action was one in which the surviving syndic, or trustee in bankruptcy, of George Constantine Zervudachi sued the defendants, Messrs. Lightbound, Owen & McIver, to obtain the return of certain documents. The defendants had received the documents and had possession of them, and did not claim any interest beyond a lien. The defendants conceded that the documents belonged to the plaintiffs who sued for them. The question between the parties was whether the defendants had a legal right to retain the documents by reason of their having a lien upon them. There was a small lien, I think, for 26*l.* or 29*l.* about which there was no dispute, but the defendants, who are solicitors, also claimed a lien for a substantial bill of costs. The question in the action was, Had the defendants that lien?

Now the circumstances under which the action was brought were these: One Zervudachi, who lived in Egypt, had acquired by purchase a concession granted by the Sultan of Turkey in respect of certain asphalte mines at or near Lattaquie on the coast of Northern Syria. There was, as I gather, not only a concession of the mines, but also a concession enabling a ropeway or aerial railway to be made from the mines to the coast. Mr. Zervudachi had arranged with one Bergheim by an agreement in writing dated September 24, 1907, under which Bergheim was to render services in connection with the concessions, and especially with reference to the flotation of a company to build a railway, to obtain shipping facilities, and otherwise to develop the property the subject of the concession. Bergheim was to have a considerable commission as remuneration for carrying out the matters referred to in that

(1) [1911] 2 Ch. 557.
(2) (1795) 6 T. R. 361.
(3) (1801) 1 East, 464.
(4) (1889) 42 Ch. D. 190, 198.
(5) (1858) 6 H. L. C. 581, 601.
(6) (1866) L. R. 2 Eq. 345.

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agreement. In the first instance before the date of the agreement Zervudachi had arranged with one Shakour Pasha to have an interest in the concession, and in a letter dated July 26, 1906, which Zervudachi had written to Shakour Pasha, he mentions that he has paid the vendor of the concession, Gilchrist, the original concessionaire, 35,000*l.* for the concession rights, and then says: "In order to have the small working capital necessary to meet the first requirements of this enterprise, and whilst other resolutions are being taken, I have decided to bring the first capital for this work to 50,000*l.* Your participation being of 30 per cent. it follows that the part which you will have to pay is increased to 15,000*l.* which sum you will be good enough to pay me at your earliest convenience." Then the letter goes on: "Thus it is with your knowledge and agreement I have given, under certain conditions, an option to participate up to the extent of 20 per cent. to the Neuchatel Asphalt Co., Ltd., of London." Then Shakour Pasha, or a company that he influences or controls and with which he is identified, paid 15,000*l.* to Zervudachi. In that way the parties were then interested as follows: Zervudachi thirty-five fiftieths and Shakour Pasha fifteen fiftieths, subject to negotiations then on foot to admit other persons to different interests. That was the position when in the next year, 1907, Zervudachi made the agreement with Bergheim to which I have already referred. Time went on, and Zervudachi complained that Bergheim did not fulfil his obligations under the agreement. Ultimately Zervudachi took proceedings against Bergheim in the Courts in Egypt and obtained there judgment against Bergheim for, I think, 15,000*l.*; but it was a judgment obtained by default. It did not appear that there were any assets of Bergheim in Egypt that could be made available to satisfy the judgment, or that Zervudachi could obtain anything more by further proceedings in Egypt, and accordingly in the next year, 1910, Zervudachi instructed the defendants, Messrs. Lightbound, Owen and MacIver, to take proceedings in England, where Zervudachi was to enforce the Egyptian judgment. Messrs. Lightbound, Owen & MacIver looked into the matter. There was very voluminous correspondence, and no doubt they incurred substantial costs in the matter, and their view was that instead of suing in England upon the Egyptian judgment the proper course would be to bring

an action in England against Bergheim in respect of their original cause of action to obtain back the concession with which Bergheim had been entrusted on entering into the agreement, and to obtain damages from Bergheim for his default in not implementing his obligations under the agreement. It then became apparent that Shakour Pasha had an interest in the property, and it was considered that he ought to be consulted before the proceedings were brought. There was an interview with M. Nassif, who was the secretary of, or represented, Shakour Pasha, with regard to his being made aware of the proceedings that were contemplated, and consenting to or approving such proceedings being taken. The matter was one of considerable complication, and it was then considered that the better plan would be for Messrs. Lightbound, Owen & MacIver, the defendants, to send to Egypt a member of their firm to take proofs and statements of the witnesses and see exactly what evidence would be required, and what facts could be proved, and as to the means of proof. Mr. MacIver, a member of the defendant firm and one of the defendants here, went out to Egypt and spent some time there in investigating the cause of action, taking proofs of witnesses and so on, and generally attending to the case. Amongst others he had an interview with Shakour Pasha in Egypt and obtained a statement from him. He then returned, and with the material in their possession the defendants had an interview with Bergheim's solicitors. That took place on May 10, 1911, and is recorded in the bill of costs on May 10, 1911: "Attending Norton, Rose & Co." (they represented Bergheim); "conferring fully as to whether anything could be done with a view to simplify the question in dispute when they informed us that Mr. Bergheim was willing to withdraw all claims against you" (that is, Zervudachi) "if you were prepared to do likewise, but in the event of your pressing your claim he would give as much trouble as possible. We informed them that it was not worth our while submitting their offer." That is the entry in the defendants' bill of costs with regard to this interview with Messrs. Norton, Rose & Co. Then the matter went on. There was communication with representatives of Zervudachi, and in August a writ was threatened. On August 28 the defendants write to Messrs. Norton, Rose & Co. that the matter was receiving their attention and they would probably be in a position to issue a

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writ before the close of the vacation, and they took counsel's opinion as to the legal position. Then it appears that Zervudachi got into financial trouble. A petition was filed, or proceedings were taken, in Egypt, there was an adjudication of bankruptcy, and ultimately he was arrested, and died by his own hand. Bergheim went abroad, met with an accident, and he too died.

Then the position was this: The original parties Zervudachi and Bergheim were both dead. The defendants communicated with the syndics who were the representatives in bankruptcy of Zervudachi, and after a little time Messrs. Norton, Rose & Co. were instructed to represent Bergheim's executors. Then the syndics looked into the matter, and ultimately in February, 1912, the syndics instructed the defendants to take proceedings against Bergheim, or his representatives, to recover 100,000*l.* alleged damages for failure to perform his obligations under the agreement. Then there was further communication between the defendants and Messrs. Norton, Rose & Co., from which it appeared that Bergheim or his representatives (I did not notice the actual date of Bergheim's death) had then raised their terms; they were no longer in May, 1912, prepared to give up the documents on equal terms as they were in May, 1911. It may be that the fact of the failure and death of Zervudachi had changed the position. They asked in the first instance for a sum of over 600*l.*, being the balance which Bergheim alleged was due to him in respect of expenditure with reference to the concession and with reference to the work. Then there were some negotiations, and ultimately it was arranged that 300*l.* should be paid, with the result that the syndics agreed to pay to Bergheim's executors 300*l.* in exchange for Bergheim's executors surrendering all the documents they had, the documents of value being the original asphalte concessions. Those were the valuable documents obtained. Then the defendants, giving particulars of their costs, claimed to have a lien against the syndics on the documents so obtained from Bergheim's executors for all their costs in connection with the matter; that is to say, they claimed a lien in respect of the bulk of the costs which had been incurred on the instructions of Zervudachi and in respect of a comparatively small sum which was costs incurred since the syndics came upon the scene and instructed the defendants.

With regard to the latter costs no question arises. Those costs were paid, and the sole question is, Have the defendants a lien in respect of the costs incurred on the instructions of Zervudachi ?

Now whilst the defendants were acting for Zervudachi and before the bankruptcy a large number of papers came into their possession, mostly correspondence, but very voluminous, running into hundreds and thousands of folios. No question arises with regard to any of those documents. No doubt documents which came into the possession of the defendants whilst they were acting for Zervudachi and before his bankruptcy would be subject to their lien, and defendants would continue to have a lien upon them notwithstanding his bankruptcy, but no question arises with regard to any of those documents. I mean no question arises in this action : they are not documents of any value for the purpose of realization ; they are not documents out of which any money can be obtained. No question arises about those ; I mention them to show that they have not escaped attention, and to put them out of the case. The other documents are the valuable ones, and I refer to them shortly as "concessions." Those were obtained after the bankruptcy and after the defendants had been instructed by the syndics to obtain them, and they were handed to the defendants as solicitors for the syndics.

Now the case on behalf of the defendants is put in two ways. It is first said that there was a partnership between Shakour Pasha and Zervudachi, that the defendants were retained as solicitors by the partners—to wit, Shakour Pasha and Zervudachi—and that both partners are liable for the costs, and that the defendants have a lien against the partnership for all their costs. [His Lordship here dealt with the facts, and found that Shakour Pasha was not a partner and was not a party to the retainer of the defendants. He then proceeded :]

Without going into the matter further in detail, I am satisfied that Mr. Leslie Scott's first point fails, and that there was no partnership. It was an equitable co-ownership but not a partnership, and there were no proceedings by Zervudachi and Shakour Pasha as partners, and nothing that could put Shakour Pasha in a position of personal responsibility for those costs. There was an interview between the defendants and Shakour Pasha in which Shakour Pasha

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recognized that ultimately he might have to bear 30 per cent. of the costs, but it was not, I think, suggested to him then that he was personally liable for the whole of the costs. The first part of Mr. Leslie Scott's arguments depends upon this as a matter of fact. In my judgment he failed to establish any partnership with Shakour Pasha, or any authority under which Zervudachi had power to pledge the credit of Shakour Pasha, by instructing the solicitors on their joint account to bring the action. No joint retainer was ever given.

Then the other part of the case is this: There being no dispute with regard to the lien for such costs as the defendants incurred on the syndics' instructions, it is said that, because the syndics instructed the defendants to take proceedings against Bergheim to obtain the concessions, they must be deemed to have accepted and taken the benefit of the negotiations that had previously taken place, and which had been conducted by the defendants as solicitors for Zervudachi, and that the lien for costs of the defendants extended to the whole of the costs incurred by Zervudachi, although at the date of the bankruptcy of Zervudachi these concessions remained with Bergheim. It was contended that the effect of the syndics' instructing the defendants was, notwithstanding the bankruptcy, to confer a lien on the defendants in respect of all the past costs incurred by Zervudachi as soon as they obtained the documents. It was attempted to establish that claim by analogy to cases where there are proceedings in Court, or proceedings in an arbitration, or proceedings to establish a claim, and where after the proceedings have continued for some time there has been a change of interest on a bankruptcy, and the trustee or representative of the bankrupt intervenes and takes up the litigation at the point at which the bankrupt had left it. Now in my opinion there is no analogy at all between proceedings of that kind and the lien so acquired and a case where there are no proceedings, but merely negotiations with regard to a matter and correspondence taking place between the solicitors on either side. Although Mr. Leslie Scott claimed that under such circumstances the solicitors would obtain a lien, yet he was quite unable to produce any authority whatever in support of the proposition. Case after case which he referred to were all cases in which there was an action, or a suit, or proceedings of some kind. In one

case it was an administration suit in which the solicitors had maintained the claim of the client to share in a fund in Court, but they were all cases with regard to proceedings, and not a single case was cited in which such a lien as is here claimed had ever been shown to exist.

In my opinion the grounds upon which the learned judge below proceeded were right. The Court has gone a considerable extent to uphold a solicitor's lien and to endeavour to see that a solicitor, having earned costs, should be paid. After the case in the House of Lords to which Mr. Leslie Scott referred of *Shaw* v. *Neale* (1), where it was held that the solicitor had no lien or charge on real estate, the Solicitors Act of 1860 was passed, under which a charging order can be obtained under certain circumstances on property recovered or preserved. But that refers again only to litigation, and under the circumstances in this case no such charging order could be obtained.

In my opinion the judgment below was right, and the claim sought to be established in these proceedings is not well founded, and the appeal fails.

BANKES L.J. I agree.

One can quite understand that Messrs. Lightbound, Owen & MacIver feel that in this case the owners of the concessions, whoever they are, are indirectly deriving a very considerable benefit from the work which they did and the expenses to which they were put on the instructions of Mr. Zervudachi before his bankruptcy; but although one would wish, if one could, to secure to the solicitor that he should be paid by the person who has actually benefited by the work which he has done, yet one can only do that if the solicitor brings his case within one or other of two well-recognized rules. Mr. Leslie Scott has contended that he has brought himself within those rules, that he has established that Messrs. Lightbound, Owen & MacIver are entitled to a general lien; and he has claimed also that they have established that they are entitled to a particular lien.

Now the first question depends entirely upon a question of fact. If in truth Messrs. Lightbound, Owen & MacIver were acting for the syndics, and for the syndics only, in those negotiations which

(1) 6 H. L. C. 581, 601.

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ultimately resulted in the handing over of the concessions, it would not be disputed that they could not claim a lien upon those concessions for work which had been done upon the instructions of clients other than the syndics. Mr. Leslie Scott has endeavoured to establish that they were really acting throughout for what he has called a partnership which included (I do not know that it consisted of) Zervudachi and Shakour Pasha, and that the instructions which were given by the syndics by that very formal letter of February 17, 1912, were not instructions given on their behalf only and to be treated as a retainer by them only, but in some way which I do not understand as a retainer on behalf of the partnership. Now as a question of fact I entirely disagree with the view presented by Mr. Leslie Scott, and it seems to me that the facts are quite conclusive the other way. [His Lordship here examined the facts, coming to the conclusion that Shakour Pasha was not a partner and was not a party to the retainer of the defendants as solicitors. He then proceeded :]

On the question of law it seems to me quite impossible to contend successfully that the rule of law which has been hitherto applied to the solicitor's lien in respect of property recovered can be applied to a case such as this. Mr. Leslie Scott has claimed that the underlying principle should be applied to it. With great respect to him, I can see a very good reason why the principle should be applied in cases where there are proceedings, whether they consist of an action or arbitration, but I can see very good reasons why they should not be applied when the solicitors are left free to take whatever course they choose in order to secure a compromise.

In my opinion this appeal fails.

BRAY J. I agree. Both on the question of fact and the question of law the matter has been so fully dealt with that I do not think it necessary to add anything.

Appeal dismissed.

Solicitors for plaintiff : *Meynell & Pemberton.*
Solicitors for defendants : *Lightbound, Owen & MacIver.*

W. J. B.

[IN THE COURT OF APPEAL.]

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April 18.

MORRIS *v.* MYNYDDISLWYN URBAN DISTRICT COUNCIL.

[1916 M. 19.]

NEWPORT (MON.) DISTRICT REGISTRY.

Local Government—Sewer—Pipe to drain several Houses into Public Sewer —Pipe constructed by Owners of Houses—Dangerous to Occupants of Houses—Pipe vested in Local Authority as Sewer—Liability for maintaining Sewer—"Nuisance"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 13, 18, 19.

The defendants, who were the urban sanitary authority, served notices, under ss. 23 and 36 of the Public Health Act, 1875, upon the owners of a row of houses within the district requiring them within a certain time to provide water-closets in the houses and to connect the same with the main sewer. By arrangement among the owners the work was carried out by the owner of two of the houses, one of which was occupied by the plaintiff. A six-inch earthenware pipe was laid through the gardens at the backs of the houses to receive the drainage of each house and to discharge into the main sewer. This pipe was laid underground until it came to the garden of the house in which the plaintiff lived, where, owing to a fall in the land half the pipe appeared above the ground. About three years after the pipe was laid the plaintiff in going down her garden slipped on the pipe and was injured. In an action against the urban district council to recover damages for the personal injuries so sustained, the pipe being a "sewer" which was vested in them, the jury found that the sewer was constructed so as to be dangerous to the occupants of the house, that the defendants had notice of its dangerous condition, and were negligent in not obviating the danger:—

Held, that as the defendant council would have been entitled if they had themselves constructed the sewer, to lay it above ground, they were not guilty of any breach of duty in maintaining the sewer in the same condition as it was when laid, and were therefore not liable to the plaintiff.

APPLICATION for judgment or a new trial in an action tried before Atkin J. and a jury at Swansea.

The action was brought to recover damages for personal injuries owing to the alleged negligence of the defendants in connection with the construction of a sewer, and also in keeping the sewer, after it became vested in them, in a dangerous condition so as to be a nuisance.

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The plaintiff resided with her husband at a house, No. 1, Penmaen Road, within the district of the defendant council, who were the urban sanitary authority. This house formed one of a row of twenty-seven houses, two of which, including the one occupied by the plaintiff and her husband, were owned by Dr. Richards, and the rest were owned by other persons. The houses had gardens at the back. On December 16, 1910, the defendants served a notice, signed by their surveyor, on the owners of the houses, reciting that it appeared to the defendant council upon the report of their surveyor that the houses were without water-closets, and requiring the owners within twenty-eight days to provide water-closets, flushing cisterns, and other necessary appliances, and to connect the same with the sewer; and further stating that, if the work was not done within the time specified, the council would do the work, and would proceed to recover from the owners in a summary way the expenses so incurred, or would declare the same to be private improvement expenses. The notice was given under ss. 23 and 36 of the Public Health Act, 1875. Nothing was done under this notice, and on June 1, 1911, a notice headed "final notice," in the same form and requiring the same work to be done as was specified in the previous notice, was served on the owners. This notice was signed by Hiley, the inspector of nuisances to the defendant council. It was arranged between Richards and the other owners that Richards should execute the work on behalf of all, and that he should lay a pipe, which would technically be a sewer, through the gardens at the backs of the houses to take the drainage of each of the houses, and then to connect with the main sewer through a manhole. Richards' agent, who was a member of the council, asked Hiley what work would be required to be done, and Hiley stated what the requirements would be. Richards accordingly employed a contractor to execute the work. A six-inch earthenware pipe was accordingly laid through the gardens at the backs of the houses, into which the drainage of each house was discharged and thence into the main sewer. The pipe was laid underground until it came to the garden of the house occupied by the plaintiff, where in consequence of a fall in the ground it was laid above ground to the extent of about half its diameter until it came to the manhole. The pipe crossed a path in the plaintiff's garden leading from the

house down to some outbuildings at the bottom of the garden, the land sloping steeply downwards from the house. Hiley in his evidence stated that in what he did he was acting for the council and that he passed the sewer. On September 18, 1915, the plaintiff while walking down the path in the daytime slipped on the pipe and sustained injuries. The plaintiff had lived in the house from a date before the pipe was laid, and both she and her husband had pointed out to Hiley and his successor the danger of the pipe being above ground.

At the trial certain questions were left to the jury which with their answers were as follows:—(1.) Was the sewer constructed in 1912 so as to be dangerous to the occupants of No. 1, Penmaen Road?—Yes. (2.) Was it so constructed by the direction and under the control of Hiley?—Yes. (3.) If so, was Hiley acting for the defendant council?—Yes. (4.) Was Hiley negligent in respect of such dangerous construction?—Yes. (5.) Was the sewer on September 18, 1915, dangerous to the occupants of No. 1, Penmaen Road?—Yes. (6.) Had the council before September 18, 1915, notice of the dangerous condition?—Yes. (7.) Could the council by reasonable means have obviated the danger?—Yes. (8.) Were the council negligent in not obviating the danger?—Yes. (9.) Was the injury to the plaintiff caused by the dangerous condition of the sewer?—Yes. The damages were assessed at 73*l.* 12*s.*

Atkin J. held that there was no evidence that the defendant council made any requirement under s. 23 of the Public Health Act, 1875, that the pipe should be laid in the way it was; that the council, when acting under s. 23, were to act on the report of their surveyor, and there was no evidence of any such report or of the council having considered the matter at all; that therefore Hiley had no authority to act in the matter so as to bind the council; and that the council were not responsible by reason of the original construction of the pipe. He further held that the council were not liable by reason of having maintained the sewer, when it became vested in them, in a dangerous condition; that there was no duty in the council to take care that the sewer was not a danger to the occupiers of the land through which it passed; that their duty was to maintain the sewer as vested in them and to keep it fit to

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carry away the sewage and so as not to be a nuisance; and that there was no obligation upon them to see that a sewer, in its inception dangerous, should cease to be dangerous. He accordingly gave judgment for the defendants. The plaintiff appealed.

Macmorran, K.C., and *Vaughan Williams, K.C.* (*Francis-Williams* with them), for the plaintiff. A report of the surveyor is not a condition of the service of a notice under s. 23 of the Public Health Act, 1875: *Hall* v. *Batley Corporation.* (1) The inspector of nuisances to the district council, who signed the second notice, gave the owner, who was carrying out the work, directions as to what the requirements of the council would be, and the findings of the jury that the pipe (which was a "sewer" within the meaning of the Act) was constructed by the direction and under the control of Hiley, who was acting for the council, rendered the council liable for the injury caused to the plaintiff by the negligent construction of the sewer. The sewer was laid according to those requirements. No doubt the duties specifically imposed on an inspector of nuisances, which are prescribed by the Local Government Board, apart from the council, in the Sanitary Officers (Outside London) Order, 1910, art. xx. (2), do not include the inspection or supervision of works in progress, but that duty is not imposed on any other officer, and the specified duties are not exhaustive. The council have power to impose other duties upon him. There was such conduct of Hiley acting for the council as made the council liable for the negligent construction of the sewer which caused the injury to the plaintiff. His approval of the mode in which the sewer was laid was equivalent to a direction by the council to do the work in that way.

Secondly, if the council are not responsible for the original construction of the sewer they are responsible for its continuance in a dangerous condition after it became vested in them under s. 13 of the Public Health Act, 1875. They were bound to keep it in repair: s. 15; and also to keep it "so as not to be a nuisance or injurious to health": s. 19. The jury have found that at the date of the accident the sewer was dangerous to the occupants of

(1) (1877) 47 L. J. (Q.B.) 148.
(2) Set out in Lumley's Public Health Acts, 8th ed., pp. 2480, 2481.

the house, that this caused the accident to the plaintiff, that the council had notice of its dangerous condition, and that they were negligent in not obviating the danger. No doubt the duty imposed upon the local authority by s. 19 to keep the sewers vested in them so as not to be a nuisance is not an absolute duty, but only a duty to take reasonable care: *Hammond* v. *St. Pancras Vestry* (1); *Bateman* v. *Poplar District Board* (2); but the jury have found negligence here. A sewer may be a "nuisance" within the meaning of s. 19 if it is dangerous to passers-by as well as if it allows the sewer gas or sewage to escape. No one can remedy the danger except the local authority: *Thurrock Grays and Tilbury Joint Sewerage Board* v. *Goldsmith*. (3) But, apart from that, a local authority, in whom a sewer under a highway is vested, are liable for negligence in allowing the sewer to be dangerous to persons passing along the highway: *White* v. *Hindley Local Board* (4); *Borough of Bathurst* v. *Macpherson* (5); *Blackmore* v. *Mile End Vestry*. (6) No distinction can be drawn in this respect between the public right of passing along a highway and the private right of an individual to walk in his garden in which a sewer is laid. The defendants are therefore liable.

Ellis Griffith, K.C., and *Montgomery*, K.C. (*Hon. M. M. Macnaghten* with them), for the defendants. The defendant council are not responsible for the construction of this pipe. The council had no power to require the owner or occupier of the house to construct a sewer. Under s. 23 of the Public Health Act, 1875, they can require the owner or occupier to make a drain, and they may require the drain "to be of such materials and size and to be laid at such level and with such fall as on the report of their surveyor may appear to them to be necessary." There was no report of the surveyor upon the matter, and the council did not make any of the requirements there specified. Even if the council had made all or any of those requirements, that fact would not have made them constructors of the pipe. Their only duty is to see that the pipe is sufficient to carry off the sewage. They had nothing to do with the safety of the occupants of the houses.

(1) (1874) L. R. 9 C. P. 316.
(2) (1887) 37 Ch. D. 272.
(3) (1914) 79 J. P. 17.
(4) (1875) L. R. 10 Q. B. 219.
(5) (1879) 4 App. Cas. 256.
(6) (1882) 9 Q. B. D. 451.

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Nor are the defendant council liable under s. 19 of the Act. The sewer was constructed as it is by the owner of the house, and the council must keep it as a sewage-carrying pipe so as not to be a nuisance or injurious to health. The council may go upon the land to improve the sewer (s. 18) and make it a good sewage-carrying sewer, but they have no power to go upon the land and place an efficient sewer at a different level merely to make its position less dangerous to the occupants of the house. The council might themselves have laid the sewer above ground or below ground or partly above and partly below ground; and if they could have so constructed the sewer, there can be no obligation upon them when a sewer so constructed is vested in them to alter its level. There is no question here of the sewer being a trap; nor of a dangerous structure connected with the sewer being placed or maintained by the sewer authority in a highway, as was the case in *White* v. *Hindley Local Board* (1) and *Borough of Bathurst* v. *Macpherson*. (2) The word "nuisance" in s. 19 means a nuisance arising from the sewage in the sewer, and the sewer must be kept so as not to be injurious to health from the sewage in it. The words "injurious or dangerous to health" occur in s. 45 of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), in reference to a drain as meaning injurious or dangerous to health from the sewage gas in it. [They also referred to *Earl of Harrington* v. *Derby Corporation*. (3)]

[SWINFEN EADY L.J. referred to *Roderick* v. *Aston Local Board*. (4)]

Vaughan Williams, K.C., in reply. The power given by s. 18 to a local authority to "improve" a sewer includes the power to cover over a sewer so as to prevent it being dangerous. It is not necessary to alter the level of the sewer. In *Roderick* v. *Aston Local Board* (4) the sewer as constructed was not a source of danger, and the defendants were not negligent.

SWINFEN EADY L.J. (after stating the facts, and saying that the arrangement under which Richards constructed what was technically

(1) L. R. 10 Q. B. 219.
(2) 4 App. Cas. 256.
(3) [1905] 1 Ch. 205, 223.
(4) (1877) 5 Ch. D. 328.

a sewer was a voluntary arrangement arrived at by the owners of the houses, and that the urban council had no power to require them to construct a sewer, but only had power to require them to drain into the public sewer:) The plaintiff's claim is based upon two grounds. First, she alleges that the defendants are responsible for the construction of this sewer, that it was constructed by their authority and under their directions, that the construction was negligent, and that therefore they are liable in this action. Secondly, in the alternative, she says that, if the defendants are not responsible for the construction of the sewer, as soon as it was made it vested in them and they are bound to keep it so that it shall not be a nuisance, that it was a nuisance and that she has suffered special damage therefrom, and that upon this ground the defendants are liable. It is not suggested that there was any concealed danger or trap on her land, and as the accident happened in her own garden no question arises as to any accident on the highway. I only mention those two matters to put them on one side.

With regard to the first point, the sewer was constructed by Richards and not by the defendants. He constructed the sewer, where it crossed his own land, partly above and partly below ground, as he was entitled to do. It is said that Hiley, the inspector of nuisances, approved of what was done. No doubt he was there from time to time. The jury have found that the sewer was constructed in such a way as to be dangerous to the occupants of the house, that it was constructed by the direction and under the control of Hiley, that Hiley was acting for the defendant council, and that he was negligent in respect of such dangerous construction. Having regard to those findings, I must take it that Hiley was acting as the representative of the council, and not as a private friend of the owner. Under s. 23 of the Act of 1875 the local authority have power, "where any house within the district of a local authority is without a drain sufficient for effectual drainage," to require the construction of a drain, and they may require the drain "to be of such materials and size, and to be laid at such level, and with such fall as on the report of their surveyor may appear to them to be necessary." There was no evidence of any requisition by the council on any of those matters. They did not specify either the materials, or the size, or the level or fall of the drain. The

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freeholder, no doubt, had the approval of Hiley from time to time of the work done, but in those circumstances it is impossible to say that this sewer was constructed by the defendants. They left it to the freeholder to construct. The defendants are not therefore under any liability on this ground.

It is then said that, if the defendants were not responsible for the construction of the sewer, the sewer when constructed vested in them and they came under the obligation specified in s. 19 of the Public Health Act, 1875. That section provides that "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." The plaintiff says that this sewer was a nuisance within the meaning of this section, and that the defendants, under the powers conferred upon them by s. 18, ought to have altered or improved the sewer by putting it underground or by otherwise making it safe. In *Roderick* v. *Aston Local Board* (1) this Court decided that a local authority might construct a sewer upon the surface of the land either wholly or in part, and were not bound to lay it underground. In that case a brick sewer, 4 ft. 6 in. in internal diameter, was about to be constructed across some pleasure grounds, and it was intended that the brickwork should be 9 inches thick, with 2 feet of earth on the top. It was proposed to carry the sewer above ground except as to 1 ft. 6 in., the effect of which would be to carry an embankment of the average height of more than 5 feet above the surface through the plaintiff's land. The Court of Appeal held that the Act authorized this. It is clear, therefore, that the defendants would have been entitled to construct, or after construction to maintain, a sewer partly above and partly below ground, or wholly above ground; and if that be so, it cannot be a breach of their statutory duty to maintain this sewer as it was constructed by the freeholder. In my opinion, therefore, the sewer was not a nuisance within the meaning of s. 19, and the plaintiff fails upon this ground also. It may be that the sewer, being in the position in which it is, renders the plaintiff's garden and outbuildings less convenient than they would otherwise have been, but that affords no ground for imposing any liability upon

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the defendants for injury to her caused by her slipping on the sewer. The appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. The plaintiff seeks to impose liability on the defendants on two grounds. It is said, in the first place, that the defendants were negligent in constructing the sewer. That contention is rested on three findings of the jury: that the sewer was constructed so as to be dangerous to the occupants of the house, that it was constructed by the direction and under the control of the inspector of nuisances, and that the inspector was acting for the council. By s. 23 of the Public Health Act, 1875, the council may require drains to be laid at such level as on the report of their surveyor may appear to them to be necessary. The surveyor to the council made no report to them in this matter, and the council did not require that the drain should be laid at any particular level. The landlord's agent, being a member of the council, asked the inspector of nuisances how the pipe should be constructed, and the inspector, according to the findings of the jury, gave certain directions, and, I have no doubt, stated how the pipe should be constructed so that he, as inspector of nuisances, would not subsequently object to it. I am unable to see how that can impose any liability upon the council. The council did not consider the matter, their surveyor did not report to them, but a person in their employment, purporting to act for them, gave certain directions which he had no right in law to give.

The other ground is this: It is said that when the pipe was constructed, inasmuch as several houses drained into it, it became a sewer and vested in the council, and that the council, knowing that the sewer so laid was dangerous, were negligent in not obviating the danger. *Roderick* v. *Aston Local Board* (1) shows that the council would have been entitled to lay this pipe across the garden, not merely at a height of 3 inches above ground, but at a much greater height, the remedy of the landlord or tenant being to obtain compensation under s. 308. If so, I am unable to see how the council can be bound to put it, when laid, underground or to take steps to prevent it being an obstruction. The Act assumes that the council will exercise their powers properly. In these

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circumstances there was no duty on the council to do anything, and therefore they were not negligent. The judgment of the learned judge was right.

BRAY J. I agree for the reasons which have been given.

Appeal dismissed.

Solicitors for plaintiff: *Smith, Rundell & Dods, for T. S. Edwards & Son, Newport (Mon.).*

Solicitors for defendants: *Gibson & Weldon, for Trevor C. Griffiths, Blackwood (Mon.).*

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[IN THE COURT OF APPEAL.]

ABINGDON RURAL DISTRICT COUNCIL *v.* CITY OF OXFORD ELECTRIC TRAMWAYS, LIMITED.

[1915 A. 1036.]

Highway—Extraordinary Traffic—Motor Omnibuses on Country Roads—Traffic satisfying a Public Need—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

In the summer of 1914 the defendants began to run a service of motor omnibuses between two places a few miles apart for the carriage of passengers. The service was an hourly service from each terminus from 9 A.M. to 9 P.M., and the omnibuses were well filled and served the needs of the district. The road along which the omnibuses ran was in the nature of a country lane, the traffic on which before the advent of the motor omnibuses consisted mainly of light country and agricultural carts. For the year after the service commenced the cost of repairing the road was nearly twice as much as it was before the service commenced. In an action by the local authority under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, to recover the extra cost so incurred as being extraordinary expenses incurred by them by reason of the damage caused by the extraordinary traffic of the motor omnibuses:—

Held, on the facts, that this new traffic on the road was not the slow and normal increase of traffic owing to the development of the district, but was extraordinary traffic within the meaning of s. 23; and that the fact that the motor omnibuses served the requirements

of the district did not prevent the traffic from being extraordinary traffic.

Held, also, that in determining whether traffic is or is not extraordinary traffic no distinction in principle can be drawn between the conveyance of persons and the conveyance of goods.

Judgment of Sankey J. [1916] W. N. 398 affirmed.

APPEAL from the judgment of Sankey J. at the trial of the action without a jury. (1)

The action was brought, under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, to recover extraordinary expenses alleged to have been incurred by the plaintiffs in the repair of two roads within their district owing to the excessive weight and extraordinary traffic of the defendants' motor omnibuses running over the roads.

The plaintiffs were the authority liable for the repair of the roads, and the claim was for the extraordinary expenses incurred for the twelve months ending on July 20, 1915, when the writ in the action was issued. The roads in question were Foxcombe Hill Road and Wootton Road, between Oxford and Abingdon. The road to Foxcombe Hill branched off the main road from Oxford to Abingdon at a point about two miles from Oxford, and proceeded to the top of Foxcombe Hill, in the neighbourhood of which there was a new residential district known as Boar's Hill. The road, which was there called Foxcombe Hill Road, went down the other side of the hill by a considerable declivity until it joined Wootton Road, which led to Abingdon. The total length of road in respect of which the claim was made was about three and a half miles, the main part of the claim being in connection with Foxcombe Hill Road.

On May 30, 1914, the defendants started a service of motor omnibuses for passengers between Oxford and Abingdon by Foxcombe Hill Road and Wootton Road. At first a motor omnibus was run only on Sundays and Thursdays, making one journey each way in the day. The service was rapidly extended until in August, 1914, a daily service was established, the motor omnibuses running hourly from each terminus from 9 A.M. to 9 P.M., there being thus twenty-four omnibus journeys over the roads in question every day. The defendants had at various times run three types of omnibuses, double-decked omnibuses which weighed 3 tons 8 cwt.

(1) [1916] W. N. 398.

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empty and 5 tons 1 cwt. full, large single-decked omnibuses which weighed 4 tons empty and 5 tons 10 cwt. full, and small single-decked omnibuses which weighed 3 tons 3 cwt. empty and 4 tons 7 cwt. full. The defendants' motor omnibuses were well filled and served the requirements of the neighbourhood. Before the advent of the motor omnibuses a one-horse omnibus had been run which conveyed people from Boar's Hill to Oxford and vice versa. The nature of the two roads was thus described by Sankey J. (and the description was adopted by the Court of Appeal): Foxcombe Hill Road was more or less a lane; there was hardly any traffic on it before the omnibuses came, and a person walking along it seldom met anybody or anything; it was very narrow at parts and very steep, and was tortuous with nasty bends; and it was merely a country lane for country light traffic, agricultural carts occasionally, and occasionally possibly a tradesman's cart, still more occasionally a motor car; but it was a mere cross country lane. Wootton Road was of a different character. It was a much better road than Foxcombe Hill Road, but at the same time did not approach what was known as a main road, and although the traffic along it was traffic of a more frequent and heavier character than the traffic along the other road, it still remained for all intents and purposes a country road. Previous to the advent of the motor omnibuses the average annual cost of repairing the two roads was about 117*l.* a mile, and afterwards the average cost rose to about 221*l.* a mile, thus showing an increase of 104*l.* a mile.

The defendants denied that the traffic was extraordinary, and contended (inter alia) that a motor omnibus service, which was run to serve the needs of a district, was not extraordinary traffic. Sankey J. held that the mere fact that the omnibuses served the needs of a district did not prevent the traffic being extraordinary traffic, and he came to the conclusion that the traffic was extraordinary traffic, and gave judgment for the plaintiffs for 350*l.*

The defendants appealed.

Disturnal, K.C., and *Eustace Hills*, for the defendants. The motor omnibus traffic in the present case is due to the normal development of traffic owing to the development of the district, and is therefore not extraordinary traffic: *Barnsley British Co-*

operative Society v. *Worsborough Urban Council* (1); *Hemsworth Rural Council* v. *Micklethwaite.* (2) If the traffic is on the road owing to a public demand and it is apparently going to continue, it is normal traffic and therefore not extraordinary. The Act is aimed at a sudden and temporary increase of traffic, e.g., the hauling of building materials for the erection of a building. If the needs of the neighbourhood require the traffic, it is not extraordinary traffic. The learned judge was wrong in simply comparing the present traffic with the previous traffic and saying from that comparison alone that it was extraordinary traffic: *Billericay Rural Council* v. *Poplar Union.* (3) The Legislature did not intend to stereotype the character of the road. All the circumstances must be taken into account: *Barnsley British Co-operative Society* v. *Worsborough Urban Council.* (4) The past user of the road is only an element for consideration. This motor omnibus traffic which was necessary to meet the requirements of the district became at once ordinary traffic. If the standard of comparison is with the user of the road before the new traffic came on to it, the traffic, however long continued, never can become ordinary traffic. In truth the district has developed and with it the traffic, but the development of the roads has not kept pace with the development of the district. This is not like the case of a person carrying goods to his own branch shops for his own profit, as in the *Barnsley Case* (5); there the public need was for the goods and not for the traffic on the road. In the present case the public need is for the traffic on the road, namely, the motor omnibuses to carry passengers, and therefore the traffic is ordinary traffic. This is apparently the first attempt to bring the traffic of motor omnibuses within s. 23 of the Act of 1878.

Clavell Salter, K.C., and *Willoughby Williams*, for the plaintiffs, were not called upon.

SWINFEN EADY L.J., having stated the facts and referred to s. 23 of the Highways and Locomotives (Amendment) Act, 1878, continued: The question we have to decide is whether the traffic is extraordinary traffic within the meaning of s. 23. In *Hill* v.

(1) [1916] 1 A. C. 291, 300.
(2) (1904) 68 J. P. 345, 347.
(3) [1911] 2 K. B. 801, 814.
(4) [1916] 1 A. C. 302.
(5) [1916] 1 A. C. 291.

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Thomas (1) Bowen L.J., in delivering the judgment of the Court, said: "Extraordinary traffic is really a carriage of articles"—and in my opinion it may be a carriage of articles or passengers—"over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common." In the present case the burden has been very much increased, the cost of repair of the roads has almost doubled, and this additional traffic is of an entirely new kind. It is not traffic which has grown up by slow degrees; it has been suddenly started on a quiet country road—it may be to serve the needs of the neighbourhood—where previously such traffic was unknown.

It is argued that, in considering whether traffic is or is not extraordinary, the Court must take into account the purpose and occasion of the traffic. The contention is that an omnibus service instituted to serve the needs of a district is not extraordinary traffic. That was the argument before Sankey J., and it was in substance the argument which was advanced unsuccessfully in *Barnsley British Co-operative Society* v. *Worsborough Urban Council* (2): "At the present day the essential characteristic of the law with regard to the user of the roads is that every member of the public is entitled to use them properly as much as he needs, and traffic will not now be treated as extraordinary, although it be heavy and although it be by traction engine, if it is the ordinary carrying traffic of persons engaged in business in the neighbourhood." So in the present case it is argued that, if the motor omnibuses merely satisfy the needs of the neighbourhood, the traffic cannot be extraordinary traffic. In my opinion that argument is not well founded. In *Barnsley British Co-operative Society* v. *Worsborough Rural Council* (3) Lord Buckmaster L.C. said: "It is therefore quite plain that before the road was used under the circumstances that I have stated traffic of the description which was put upon it by the appellants would not have been the ordinary traffic of the road; but this is essentially a question of fact, and a question of fact

(1) [1893] 2 Q. B. 333, 340. (2) [1916] 1 A. C. 295.
(3) Ibid. 299.

which I think must be determined at the time, and under all the circumstances existing, when the complaint was made. I do not think it is necessary in this case to consider how long the road may be the subject of extraordinary traffic before such extraordinary traffic becomes ordinary. What the learned judge who tried this case himself said with regard to that matter appears to me to be perfectly sound, namely, that extraordinary traffic is not the traffic which is due to the slow and normal increase of the development of traffic owing to the development of the district." Those observations are applicable to the present case. The service of motor omnibuses was not the slow and normal increase of the development of traffic owing to the development of the district; it was a service put on at one time, that is to say, it increased so rapidly from the time of its first institution that it may be considered as having been substantially put on at one time; and it was a traffic wholly different in character from anything that preceded it. It is said that if the traffic is now extraordinary it must always remain so. I do not accept that. We are only dealing with a particular year, and traffic which, when it first comes on the road, is new and out of the ordinary may in course of time become ordinary. We have only to determine whether the plaintiffs have made out that during the particular year when they were put to the additional expense of 350*l.* for the repair of the roads by reason of this new traffic that traffic was extraordinary traffic within the meaning of s. 23 of the Act of 1878. The learned judge came to the conclusion that it was, and he did not misdirect himself in any way. I adopt the language of Lord Buckmaster in the *Barnsley Case* (1): "I am unable to find that the learned judge, who considered this case and gave a long and careful judgment, has in any respect whatever misdirected himself in forming the opinion which he expressed as to this user complained of having been extraordinary and excessive." Whether traffic is extraordinary is a question of fact in each particular case, and all the circumstances must be taken into consideration. In my opinion the learned judge arrived at the right conclusion.

I am unable to accept the distinction which was attempted to be drawn between this case and the *Barnsley Case* (2), namely,

(1) [1916] 1 A. C. 300. (2) Ibid. 291.

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that in that case the demand of the neighbourhood was for goods, however conveyed, whereas in this case the demand is for the actual mode of conveyance by motor omnibuses. New traffic coming on to a road may be in respect of the conveyance of goods or of persons. There is no distinction in principle between the two in determining whether traffic is or is not extraordinary.

For these reasons I think that the judgment of Sankey J. was right, and that the appeal fails.

SCRUTTON L.J. I agree.

BRAY J. I agree. It is to my mind clear that this traffic comes within the description of extraordinary traffic which has been read by Swinfen Eady L.J. from the judgment of Bowen L.J. in *Hill* v. *Thomas* (1); and also within the language of Lord Buckmaster L.C. in *Barnsley British Co-operative Society* v. *Worsborough Urban Council* (2): "The learned judge must determine, having regard to all the circumstances, what was the ordinary traffic of the road, and he must then settle whether or no the traffic complained of was not that ordinary traffic, but was extraordinary traffic which the road was not accustomed to bear." It is said that there must be an exception to that, namely, that traffic is not extraordinary if it meets the requirements of the neighbourhood owing to the development of the district. The learned judge did not accept that; and he further found as a fact, as I understand, that, even if that were right, this traffic was not due to the development of the district, and certainly not the slow and normal increase of traffic owing to the development of the district. In my opinion the learned judge was right and this was clearly extraordinary traffic.

Appeal dismissed.

Solicitors for plaintiffs: *Church, Adams, Prior & Balmer, for Challenor & Son, Abingdon.*

Solicitor for defendants: *Sydney Morse.*

(1) [1893] 2 Q. B. 340. (2) [1916] 1 A. C. 300.

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Distinguished. SHORE *v.* MINISTRY OF WORKS. [1950] 2 All E.R. 228.

Not applied. PROTHEROE *v.* RAILWAY EXECUTIVE. [1950] 2 All E.R. 1093.

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May 2, 3, 4.

[1916 M. 2182.]

Innkeeper—Liability—Guest—Personal Injuries—Fitness of Premises—Negligence of Independent Contractor.

By reason of the contractual relationship existing between an innkeeper and a guest in the inn there is an implied warranty by the innkeeper that the inn premises are, for the purpose of personal use by the guest, as safe as reasonable care and skill on the part of any one can make them, but the innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises.

Francis v. *Cockrell* (1870) L. R. 5 Q. B. 501 followed and applied; *Indermaur* v. *Dames* (1866) L. R. 1 C. P. 274; (1867) 2 C. P. 311 distinguished.

FURTHER CONSIDERATION of an action tried by McCardie J. and a jury at the Liverpool Assizes.

The plaintiff, an unmarried woman, claimed damages from the defendant, a hotel proprietor, for personal injuries sustained by her on the occasion of an outbreak of fire at the defendant's hotel on June 17, 1916, while the plaintiff was staying there as a guest. The plaintiff alleged that the fire was caused by the defendant's negligence, and that it was an implied term, condition, and warranty of the contract between the plaintiff and the defendant that the hotel should be reasonably fit for her occupation with safety, and that it was not reasonably fit.

The facts are stated in the judgment.

The jury, in answer to the questions left to them, found (1.) that the premises were not as safe as reasonable skill and care could make them; (2.) that the fire resulted from the absence of reasonable skill and care on the part of those who carried out the kitchen fire scheme in 1910; (3.) that the defendant was negligent in not having made further inquiry than he did as to the cause of a previous outbreak of fire at the hotel in 1915; (4.) that the defendant was not guilty of negligence in not providing a fire escape on the premises; and (5.) that the injuries to the plaintiff were the result of the fire

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and were not caused by any unreasonable conduct on her part Damages, 865*l.* 17*s.*

Langdon, K.C., and *W. Procter*, for the defendant. The liability of an innkeeper for the personal safety of his guest is the same as that of any other invitor towards an invitee—that is to say, there is a duty to use reasonable care to prevent damage from unusual danger: *Indermaur* v. *Dames* (1); *Sandys* v. *Florence*. (2) The fact that in the case of an innkeeper the duty arises out of the contractual relationship existing between him and his guest does not impose any greater burden upon him than would exist at common law apart from contract. There is no implied warranty by an innkeeper that every independent contractor who has done repairing work on the premises of the inn has exercised due care. It may have been a reasonable implication in *Francis* v. *Cockrell* (3) that a person who causes a race-stand to be erected, and invites the public to use it, should be liable if the stand has been negligently constructed by the contractor employed by him; but it would be most unreasonable to make a similar implication in the case of an innkeeper, particularly where, as in the present case, the contractor was not employed by the defendant but by a previous owner of the hotel.

[McCARDIE J. referred to *Walker* v. *Midland Ry. Co.* (4)]

It was not suggested by the House of Lords in that case that the contractual relationship between an innkeeper and his guest creates a higher duty than as between invitor and invitee. [*The Moorcock* (5), *Norman* v. *Great Western Ry. Co.* (6), *Marney* v. *Scott* (7), *Readhead* v. *Midland Ry. Co.* (8), *Hyman* v. *Nye* (9), and *Cox* v. *Coulson* (10) were also referred to and discussed.]

Secondly, there was no evidence that the defendant had been personally negligent or that his negligence caused the plaintiff's injuries: *Jones* v. *Boyce*. (11)

C. Atkinson, K.C., and *A. Cairns* (*E. Acton* with them), for the plaintiff. On the findings of the jury the plaintiff is entitled to

(1) L. R. 1 C. P. 274; 2 C. P. 311.
(2) (1878) 47 L. J. (Q.B.) 598.
(3) L. R. 5 Q. B. 501.
(4) (1886) 55 L. T. 489.
(5) (1889) 14 P. D. 64.
(6) [1915] 1 K. B. 584.
(7) [1899] 1 Q. B. 986.
(8) (1869) L. R. 4 Q. B. 379.
(9) (1881) 6 Q. B. D. 685.
(10) [1916] 2 K. B. 177.
(11) (1816) 1 Stark. 493.

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judgment. The contractual relationship existing between innkeeper and guest creates an implied warranty by the innkeeper that his premises are as fit for the purpose as reasonable skill and care can make them. An innkeeper is not protected from liability for personal injuries suffered by a guest through a defect in the structure of the premises by reason of the fact that the defect, unless it was a latent defect, was due to negligence or lack of skill on the part of an independent contractor employed by the innkeeper or his predecessor. The present case is governed by *Francis* v. *Cockrell.* (1) [In addition to the cases cited for the defendant, *Biddle* v. *Hart* (2) and *Earl* v. *Lubbock* (3) were also referred to.]

Langdon, K.C., in reply. It is obvious from Blackburn J.'s judgment in *Searle* v. *Laverick* (4) that he thought that the decision in *Francis* v. *Cockrell* (1) went too far, and it should be confined strictly to the particular facts of that case.

Cur. adv. vult.

May 4. McCARDIE J. read the following judgment:—This important action was tried before a special jury and myself at the Liverpool Assizes. The defendant is an innkeeper. He is the lessee and occupier of the well-known Imperial Hotel in the centre of Liverpool. On the night of June 17, 1916, the plaintiff became a guest for reward to the defendant at this hotel. She was given a room on the second floor. Soon after midnight a fire arose in the upper part of the building. It spread rapidly. Flames broke out. The roar of the fire was heard throughout the building. The plaintiff was seriously alarmed. She was unaware of the position of the staircase, for upon her arrival at the hotel at a late hour she had ascended by the lift, and was at once shown to her appointed bedroom. She sought to escape from her room by means of a rope made of sheets and blankets. Unhappily she fainted when making her descent, and she fell heavily upon a glass roof below, whereby she suffered injuries of the gravest nature.

Thereupon she brought this action against the defendant innkeeper. She based her claim on two grounds—namely, (*a*) breach of warranty, and (*b*) personal negligence by the defendant. I deal with

(1) L. R. 5 Q. B. 501.
(2) [1907] 1 K. B. 649.
(3) [1905] 1 K. B. 253.
(4) (1874) L. R. 9 Q. B. 122.

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the question of warranty first. It raises a point of great and general importance.

The plaintiff asserts that the contract between the defendant and herself carried with it the implied warranty that the premises were as safe as reasonable care and skill could make them. If that warranty existed, then the breach of it by the defendant has been established. The jury expressly found that the premises were not as fit as reasonable care and skill could make them. There was ample evidence to support that finding. The fire arose by reason of the ignition of a beam of wood facing the lift shaft in the centre of the hotel. The ignition was caused through a defective scheme for conveying the smoke and burning soot from the kitchen chimney. The details are unimportant. Suffice it to say that it was admitted that the arrangement was seriously defective, and the defendant expressly stated in evidence that, had he known of it, he would at once have caused it to be altered in order to avoid the risk of fire.

This defective scheme was carried out in 1910. In that year the defendant took a lease of the premises for a long period. His landlord covenanted to expend 2000*l.* as the defendant should direct. Plans were prepared by the landlord's architect. The defendant saw and approved them, but they did not disclose the defective arrangement. A builder was employed by the landlord to carry out the plans. Either the architect or the builder or both were admittedly guilty of a serious want of care in directing or carrying out a scheme which created from the first a serious risk of fire and which ultimately caused the conflagration on the night in question. Hence the finding of the jury that the premises were not as safe as reasonable care and skill could make them. Those are the facts so far as at present material.

The nature and extent of the defendant's warranty (if any) to his guest has been the subject of full and able argument. The liability of an innkeeper for the goods of his guest is that of an insurer, subject to well-known statutory and common law limitations; but the liability of an innkeeper with respect to the personal safety of his guest is less onerous: see *Calye's Case.* (1) He does not insure the personal safety of the guest. The reason for the graver liability in

(1) (1584) 8 Rep. 32a; 1 Sm. L. C., 12th ed., p. 131.

the case of goods (which is prima facie anomalous) is to be found in the social conditions which existed when the liability first became established. The prevalence of highway robbery and the risk of possible collusion between the thief and the innkeeper of those early days adequately account for the onerous burden on the latter with respect to goods: see Jones on Bailment, p. 95. A like variation of liability with respect to the goods as distinguished from the person of a passenger exists in the case of common carriers. At common law they are insurers of the goods they receive subject to well-known limitations, but they do not insure the personal safety of the passenger: see per curiam, *Readhead* v. *Midland Ry. Co.* (1); *East Indian Ry. Co.* v. *Kalidas Mukerjee.* (2) This variation of liability is due, I think, to the historical reasons which have created the like distinction in the case of innkeepers.

Now, what is the liability of an innkeeper with respect to the personal safety of his guest? It is obvious that the guest is an invitee. It follows, therefore, that the innkeeper, as the occupier of premises to which he has invited the guest, is bound, as a matter of common law duty, to take reasonable care to prevent damage to the guest from unusual danger which the occupier knows or ought to know of: see per Willes J. in *Indermaur* v. *Dames.* (3) That judgment was approved by the Exchequer Chamber. (4) It is to be observed that no question arose in *Indermaur* v. *Dames* (5) with respect to the responsibility of the defendant for the negligence of an independent contractor. The rule in *Indermaur* v. *Dames* (5) was approved by the Court of Appeal in *Norman* v. *Great Western Ry. Co.* (6), where it was held that a person on the premises of a railway company as of right could enforce no higher measure of obligation than existed in favour of a mere invitee. The measure of duty owed by an occupier to his invitee is therefore of a limited character.

Now, no contract at all existed between the plaintiff and the defendant in the cases of *Indermaur* v. *Dames* (5) and *Norman* v. *Great Western Ry. Co.* (6) In the present case, however, the plaintiff was a guest of the defendant, and a contractual relationship therefore

(1) L. R. 4 Q. B. 381, 388.
(2) [1901] A. C. 396, 401.
(3) L. R. 1 C. P. 288.
(4) L. R. 2 C. P. 311.
(5) L. R. 1 C. P. 274; 2 C. P. 311.
(6) [1915] 1 K. B. 584.

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existed between them. Did that contract impose on the defendant a severer obligation than was held to exist in *Indermaur* v. *Dames* (1) towards a mere invitee? In his masterly treatise on the Law of Torts Sir Frederick Pollock apparently draws no distinction between cases where a contract exists between the plaintiff and the defendant and cases where there is no such contractual relationship: see Pollock on Torts, 10th ed., pp. 530-538. Moreover, in *Marney* v. *Scott* (2) Bigham J. used the following words: "I do not think that the question as to whether the defendant's liability arises out of contract or out of tort is really material, for the measure of that liability would, in my opinion, be the same in either case." From a later passage in the same judgment it seems to be clear that he draws no line whatever between the cases where a contract exists and cases where it does not exist. He treats *Indermaur* v. *Dames* (1) as one with *Francis* v. *Cockrell.* (3) With all respect to so distinguished a judge and to the eminent jurist, Sir Frederick Pollock, whose views he adopted, I am unable to agree with the dictum of Bigham J. In my opinion the existence of a contract between the plaintiff and the defendant in such a case as that now before me is of great importance, for it may lead to the implication of a warranty which carries the duty of a defendant substantially beyond the obligation indicated in *Indermaur* v. *Dames.* (1) I think that the observation of Hamilton L.J. in *Latham* v. *Johnson* (4) is well founded where he says: "Contractual obligations of course stand apart." Where the plaintiff is a guest at the defendant's inn the duty of the defendant cannot be less than the duty laid down in *Indermaur* v. *Dames* (1); but it may be substantially greater. To what extent does it exceed the *Indermaur* v. *Dames* (1) obligation? The plaintiff asserts that there is here a warranty implied by law against the defendant that his hotel was as safe as reasonable care and skill could make it. Is this contention sound?

The authorities stand as follows: In *Readhead* v. *Midland Ry. Co.* (5), where many earlier decisions were considered, the plaintiff was a passenger for payment. A contract therefore existed between the parties. It was held that a warranty was to be implied that the

(1) L. R. 1 C. P. 274; 2 C. P. 311.
(2) [1899] 1 Q. B. 989.
(3) L. R. 5 Q. B. 501.
(4) [1913] 1 K. B. 398, 410.
(5) L. R. 4 Q. B. 379.

defendants would take due care to carry the plaintiff safely, but that they incurred no liability for damage arising from a latent defect which no human skill or care could have prevented or detected. It was, however, held to be unnecessary to determine whether the defendants could be held responsible for the negligence of independent contractors whom they employed to construct works or to furnish carriages for them. The decision in *Readhead's Case* (1) is not in itself sufficient to support the present plaintiff's contention.

In the year 1870, however, the case of *Francis* v. *Cockrell* (2) was decided. The decision of the Court of Queen's Bench was affirmed by the Exchequer Chamber. The judgments in that case are of the first importance, although perhaps the reasons given and some of the incidental observations are not wholly consistent. They were not written judgments: see per Blackburn J. in *Searle* v. *Laverick*. (3) But this decision established that a defendant who sells a ticket to another for a seat at a race-stand, which he has caused to be erected by an independent contractor, warrants that the race-stand is reasonably fit for the purpose for which it is to be used, subject to the limitation that the defendant is not to be held responsible for defects which could not have been prevented or discovered by reasonable care on the part of any one. The true effect of the decision is, I think, best stated by Montague Smith J. (4), namely, that "the defendant promised that due care and skill had been used in the construction of the building," or (to put the matter in an alternative way) that "the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so." It is obvious from this decision that the defendant in such a case may be liable for the negligence of an independent contractor.

In 1881 the case of *Hyman* v. *Nye* (5) was decided by Lindley and Mathew JJ. Here the defendant was held to have warranted that a carriage hired by him to the plaintiff was as fit for the purpose as care and skill could make it. It is clear from the judgments, and particularly from the forcible judgment of Lindley J., that it would not have availed the defendant to show that the defect was

(1) L. R. 4 Q. B. 379.
(2) L. R. 5 Q. B. 501.
(3) L. R. 9 Q. B. 128.
(4) L. R. 5 Q. B. 513.
(5) 6 Q. B. D. 685.

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not due to the default of himself or his servants but to the default of an independent contractor.

The case of *Cox* v. *Coulson* (1) must next be mentioned. The plaintiff in this case had purchased a ticket from the defendant for a seat at a theatre of which the defendant was manager and lessee. Swinfen Eady L.J. said this (2): "The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care: *Francis* v. *Cockrell* (3); *Norman* v. *Great Western Ry. Co.* (4) The defendant does not absolutely warrant the security of his premises: *Readhead* v. *Midland Ry. Co.* (5) He does, however, warrant, not only that there shall be due care on the part of himself and his servants, but also that there shall be due care on the part of any independent contractor who may have been employed by him in the construction or repair of the premises." The point of these words for the present purpose is that Swinfen Eady L.J. treats the *Francis* v. *Cockrell* (3) rule as applying as much to a theatre as a race-stand. And indeed I see no valid ground for distinguishing between one class of premises and another. In *Francis* v. *Cockrell* (6) Kelly C.B. thus stated his view: "First, there is the principle which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeple-chase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination."

So too as to premises generally the rule, I think, is the same, and upon the decisions as they stand may be stated as follows, namely: Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contem-

(1) [1916] 2 K. B. 177.
(2) [1916] 2 K. B. 181.
(3) L. R. 5 Q. B. 501.
(4) [1915] 1 K. B. 584.
(5) L. R. 4 Q. B. 379.
(6) L. R. 5 Q. B. 508.

plated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises; and the head-note to *Francis* v. *Cockrell* (1) must to this extent be corrected. But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants, or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises.

In my opinion this rule applies to the present case. The principle is basic and applies alike to premises and to vehicles. It matters not whether the subject be a race-stand, a theatre, or an inn; whether it be a taxicab, an omnibus, or a railway carriage. The warranty in each case is the same, and for a breach thereof an action will lie. In my view the law is indicated with clearness and precision by Mr. Salmond in his vigorous and acute treatise on the Law of Torts, 4th ed., p. 399. Here the jury have found, and rightly found, in the plaintiff's favour that the premises were not as safe as reasonable care and skill could make them.

It is desirable to refer to several decisions (not already dealt with in this judgment) which were cited in the course of the argument before me. In *Sandys* v. *Florence* (2), decided by Lindley J., it was impliedly held that a guest must prove negligence on the part of the defendant innkeeper or his servants before he can recover for personal injuries. It is curious that upon the arguments in the case no reference was made to *Francis* v. *Cockrell* (1), which had been decided eight years before. It will suffice to say upon *Sandys* v. *Florence* (2) that apparently the question of warranty was overlooked. It is worthy of observation that the same judge, Lindley J., delivered the cogent judgment in *Hyman* v. *Nye* (3) in 1881 to which I have already referred.

In *Walker* v. *Midland Ry. Co.* (4) the House of Lords discussed

(1) L. R. 5 Q. B. 501.
(2) 47 L. J. (Q.B.) 598.
(3) 6 Q. B. D. 685.
(4) 55 L. T. 489.

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the question of an innkeeper's liability for the personal safety of the guest on the footing that actual negligence on the part of the defendants or their servants must be proved. But the actual decision turned upon a wholly different point, namely, that the innkeeper owes no duty to the guest with respect to that portion of a hotel which a guest ought not to enter. It is strange that in this case also the decision in *Francis* v. *Cockrell* (1) was not mentioned. The question of warranty was, I infer, again overlooked, and I cannot regard the decision of the House of Lords in *Walker's Case* (2) as adverse to the rule which I have endeavoured to formulate in this judgment. That rule puts on the defendant a greater obligation than exists with respect to a mere invitee, but a less obligation than is imposed on a man who sells a chattel to another for a specific purpose: see *Randall* v. *Newson*. (3) The obligation stands midway in the present case.

With respect to *Searle* v. *Laverick* (4), which was cited by Mr. Langdon in the course of his excellent argument, I feel that the judgment of Blackburn J. may suggest a sense of regret at the decision in *Francis* v. *Cockrell*. (1) But the actual decision in *Searle* v. *Laverick* (4) relates to the bailment of goods, and in my opinion it has no relevance to the point now at issue.

But a judgment in the present case in favour of the plaintiff can well be supported upon another ground, inasmuch as the jury were satisfied that the defendant had been personally negligent in that he had omitted to take such steps and to make such inquiries as would have revealed to him the defects in his structure and the risks of fire thereby occasioned. They further found that that negligence substantially contributed to causing the injuries to the plaintiff. [His Lordship referred to the evidence and expressed agreement with the findings of the jury.]

A subordinate but not unimportant point was also argued before me. Mr. Langdon contended that the plaintiff was not entitled to recover because (as was alleged) she brought the injuries upon herself by her own unreasonable conduct. As I have already stated, the plaintiff was on the second floor. The fire commenced at about the fourth floor. Before it effectively reached the plaintiff's corridor

(1) L. R. 5 Q. B. 501.
(2) 55 L. T. 489.
(3) (1877) 2 Q. B. D. 102.
(4) L. R. 9 Q. B. 122.

it had been subdued by the fire brigade. Had the plaintiff remained in her room she would not in fact have been injured. Her injuries resulted from her endeavour to escape by means of an improvised rope to the ground floor. But the jury have expressly found that the plaintiff acted reasonably in the circumstances of the case. I agree with this finding; it was fully justified by the evidence. [After commenting on the facts his Lordship continued:] In my view the circumstances which were proved and the finding of the jury bring this case directly within the principle of *Jones* v. *Boyce*. (1) I think that the words of Lord Ellenborough in that well-known case are good law and good sense. The conduct of the plaintiff cannot be effectively tested by the light of facts subsequently and precisely ascertained; it is necessary to regard the circumstances as they appeared to her at the time.

There must be judgment for the plaintiff for 865*l*. 17*s*. with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Chester, Broome & Griffithes, for Blackburn & Walker, Manchester.*

Solicitors for defendant: *Lowe & Co., for Newman, Fogg & Robinson, Liverpool.*

(1) 1 Stark. 493.

F. O. R.

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April 17, 18; *May* 8.

EVANS & CO. *v.* HEATHCOTE AND OTHERS.

Restraint of Trade—Trade Combination to Control Prices—Agreement to Restrict Output, to sell only to certain Persons, and on terms and at Prices to be fixed by the Combination—Agreement unlimited in Point of Time—Reasonableness as between Parties.

The plaintiffs were manufacturers of "cased tubes," and were members of a trade combination called the Cased Tube Association, and the defendants, who were also manufacturers of cased tubes, consisted of all the other members of the association. The object of the association was the regulation of prices in the trade, and in furtherance of that object it was provided by the rules that each member should be restricted in his output of cased tubes to a certain fixed percentage of the total output of the members, the percentage being based on the member's actual output in preceding years. Each member whose output in any month exceeded his percentage was required to pay the profits of such excess into a "pool," while each member whose output in any month was less than his percentage was entitled to receive a certain sum out of the pool. The rules provided that the members should sell their cased tubes only upon the terms and at the prices which should from time to time be fixed by the association. No means was provided by which a person who had once joined the association could terminate his membership. By an agreement made between the plaintiffs, the defendants, and certain firms, the plaintiffs, in consideration of the defendants fixing their percentage at a certain figure, agreed not to sell their cased tubes to any persons other than the said firms. The agreement provided that it should continue in force as long as the association and a certain other society, over whom the plaintiffs had no authority, continued to control prices. For several months the plaintiffs' output was less than their percentage, and they became entitled to receive from the association sums of money out of the pool, and the secretary of the association furnished them each month with an account showing how much they were entitled to for that month. In an action brought to recover the money so due:—

Held, that the restraint of trade imposed by the agreement and the rules was unreasonable as between the parties and consequently illegal; and that the plaintiffs could not recover the money claim either upon the agreement and the rules, or upon the accounts stated by the association's secretary.

FURTHER CONSIDERATION before Low J. after trial at the Birmingham Assizes.

The plaintiffs were a limited company carrying on business in

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Birmingham as manufacturers of what are known as "cased tubes," iron tubes cased in brass and used mainly in the manufacture of bedsteads. The plaintiffs were members of a society known as the Cased Tube Association, a society composed of divers persons, firms, and companies engaged in the manufacture of cased tubes. The defendants were the members of the Cased Tube Association other than the plaintiffs. The rights and obligations of the members were regulated by the rules of the association. By rule 2 of those rules "The object of the association shall be the regulation of prices and the taking of such action for the protection of the interests of the members as may from time to time be decided upon." In furtherance of that object the rules provided that each member of the association should be restricted in his output of cased tubes, his output being limited to a fixed percentage of the total output of the members, that percentage being based on the member's actual output in certain preceding years. Each of the members whose output of cased tubes actually sold by such member during any calendar month was greater than the percentage to which he was entitled was required to pay into a "pool" of the association the amount of the profits derived from such excess; while on the other hand each of the members whose output was in any month less than his percentage was entitled to have a certain sum paid to him out of the pool. The members were required to make monthly returns of their output to the secretary. By rule 21: "The association terms shall be as stated in the price lists issued from time to time." Rule 22: "Every member shall charge the basis prices, extras, and discounts as set out in the price list of the association adopted December 23, 1904, and confirmed January 23, 1908, or such other prices as may be fixed upon from time to time by the association in general meeting in the manner herein provided." By rule 35, which is headed "Resignation or Retirement of Members," any member who commits certain breaches of the rules, or "has persistently acted in a manner hostile to the interests of the association may by resolution be expelled from the association, whereupon he shall forfeit his interest in the funds or property of the association." The rule was silent as to the voluntary resignation or retirement of a member. By rule 36: "No contract shall be allowed. No orders may be taken beyond the amount the member can supply

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in one month from the date order is received, except on the understanding that orders are subject to an alteration of discounts after each month's supply is delivered." Rule 38: "An object of the association being to ensure the progressive proportionate development of the business of members, the basis of the rules and regulations shall not be altered for one year from the formation of the association if any member sent in a written protest against such alteration." By an agreement dated June 24, 1913, and made between five firms of bedstead manufacturers, therein called "the manufacturers," of the first part, the plaintiffs Evans & Co. of the second part, and the Cased Tube Association of the third part, the association fixed the percentage of the plaintiffs at 6·81 of the whole of the output of cased tubes of the then members of the association, in consideration whereof the plaintiffs by clause 2 agreed not to sell any cased tubes to any persons other than the five "manufacturers," and the "manufacturers" by clause 3 undertook not to purchase cased tubes from any persons other than members of the association. The "manufacturers," who were not themselves members of the association, were respectively shareholders in the plaintiff company, which was a member of it, and by the agreement they undertook not to part with their shares to a person who was a stranger to the association without first offering them to members at the price which the stranger was willing to give. It was further provided that the agreement should be effective and binding upon each of the parties thereto only so long as both the Cased Tube Association and a society called the Bedstead Manufacturers' Federation continued to control prices. From the end of March, 1915, down to the end of November, 1915, the plaintiffs' output of cased tubes was in each month less than 6·81 of the total output of the whole of the members, and the plaintiffs consequently became entitled to receive from the association sums of money out of the pool in respect of their deficiency in those months, and they received from the secretary of the association a monthly account showing how much they were entitled to out of the pool in each month. The aggregate of the sums stated in those monthly accounts amounted to 958*l.* 1*s.* 7*d.* The action was brought to recover that sum under the contract and rules, and also upon an account stated. The defendants pleaded that the action was not maintainable, on

the ground that the rules of the association and the agreement of June, 1913, were illegal as being in restraint of trade.

P. O. Lawrence, K.C., *Hollis Walker*, K.C., and *E. W. Cave*, for the defendants. The object of the association is, as the rules state, the regulation of prices, and as such it is in restraint of trade. In order to be valid a contract imposing a restraint of trade must satisfy two conditions—first, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. With the latter condition the present case is not concerned. The contention that a particular contract is prejudicial to the public interests must be based on express evidence: *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1); and there is admittedly no evidence that the agreement is so here. The only question for the Court is whether it satisfies the condition of being reasonable as between the parties. "To be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed": per Lord Parker, *Herbert Morris, Ld.* v. *Saxelby*. (2) Here the restraint is much wider than is necessary for the adequate protection of the association. Each member hands himself over to the other members as bound for the whole of the joint lives of himself and the association to abide by any restrictions upon the manner of the conduct of his trade which they may thereafter choose to impose. The obligation may last for his life, for there is no means of getting rid of his membership. Rule 35 only deals with involuntary expulsion; it says nothing in the body of the rule about voluntary resignation. By rules 21 and 22 he is only to sell on the terms and at the prices which may from time to time be fixed by the association. By rule 36 he is to make no "contracts" (by which expression is to be understood "forward contracts"), but is to limit himself to the acceptance of orders which can be executed in a month, while by clause 2 of the agreement of June 24, 1913, he binds himself to sell to no one except the five manufacturers. That is a restraint which no Court would enforce, it being quite beyond what is necessary for protecting the business of the trade.

Disturnal, K.C., and *Gandy*, for the plaintiffs. A combination in

(1) [1914] A. C. 461. (2) [1916] 1 A. C. 688, 707.

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restraint of trade, the restraint imposed by which is unreasonable as being opposed to the interests of the public, is illegal in the ordinary sense of the term, being quasi-criminal; and if the combination is brought about by means of a contract the whole of the contract is tainted with the illegality, and money payable under it cannot be recovered. The part of the contract dealing with the recovery of money cannot be severed from the part imposing the restraint. But it is conceded that there is no evidence that the contract in the present case is prejudicial to the public; the only contention is that it is unreasonable as between the parties. Such a contract is illegal only in the sense that it is unenforceable, and it is unenforceable only in so far as it is sought to impose the restraint. Stipulations in such a contract which are unconnected with the restraint may be enforced, the good parts of the contract being severable from the bad: *Swaine* v. *Wilson.* (1) If a servant serves under a contract which is unenforceable against him by reason of a restraint, but is not prejudicial to the interests of the public, the nature of the contract cannot be an answer to a claim for his wages. It is not the contract in such a case that is void, but the restraints which the contract contains. Here the plaintiffs are not attempting to enforce a stipulation which is unreasonable as against the defendants. They have performed the conditions on which the money became payable, and it does not lie in the defendants' mouth to say that unreasonableness in an independent matter affords any excuse for a refusal to pay. The Court should hesitate to say that an agreement into which traders in the position of the plaintiffs and defendants have voluntarily entered is unreasonable as between them. In the *North Western Salt Co.'s Case* (2) Lord Haldane said: "When the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the

(1) (1889) 24 Q. B. D. 252. (2) [1914] A. C. 461, 471.

parties as the best judges of what is reasonable as between themselves." Here there is nothing unreasonable in the plaintiff company being prohibited from dealing with purchasers other than the five firms. Those firms are not strangers, but shareholders of the plaintiff company, and it cannot be unreasonable for a company to agree to divide their output between their own shareholders. The mere fact that there is no power for the parties to a contract to terminate it does not show that it is unreasonable. If it is in other respects unreasonable it cannot be enforced, and you do not want the power of retirement; if it is reasonable for the protection of the parties' interests it does not become unreasonable because it protects them permanently. It has never been suggested that a partnership for the joint lives of the partners is ipso facto unreasonable.

But assume that the contract is unreasonable, and therefore is unenforceable, that fact does not preclude the plaintiffs from suing on the account stated by the defendants' secretary. If an account is stated under an oral contract within the Statute of Frauds, the amount so stated in account can be recovered although an action could not be brought on the contract itself: *Cocking* v. *Ward* (1); the action in such case being founded on a new implied promise to pay.

P. O. Lawrence, K.C., in reply. Although an account stated implies a promise to pay, an action upon that promise can always be defeated by showing that the money is in fact not payable. The Statute of Frauds is a mere procedure statute, and affects the remedy only and not the rights of the parties—it says that the contract shall not be sued upon unless it is evidenced in a particular way; but where a contract is bad as being in restraint of trade an action could under no circumstances be brought upon it. The distinction drawn by the plaintiffs between two classes of contracts in restraint of trade, one of which is supposed to be illegal in the sense of criminal, and the other only unenforceable, is misconceived. The terms "illegal" and "unenforceable" as applied to contracts in restraint of trade mean the same thing. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2) Lord Bramwell, speaking of such a contract, said: "I think . . . . we should hold that the agreement was illegal, that is, not enforceable by law." And in *Attorney-*

(1) (1845) 1 C. B. 858. (2) [1892] A. C. 25, 46.

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General of Commonwealth of Australia v. *Adelaide Steamship Co.* (1) Lord Parker said: "It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed." The contention that a contract in restraint of trade is not open to objection unless the party suing on it is thereby seeking to enforce the restraint cannot be supported. If the main purposes of the contract are unreasonable that will invalidate the whole contract; the portions of it which per se would be unobjectionable are not severable from the rest. In *Russell* v. *Amalgamated Society of Carpenters and Joiners* (2), where the rules of the society combined provisions for the militant purposes of a trade union, which were in restraint of trade, with provisions for the provident purposes of a friendly society, it was held that the latter were tainted with the illegality of the former, and that an action by a member of the society to enforce payment of a benefit out of the fund to which he had contributed for that purpose was not maintainable. *Swaine* v. *Wilson* (3) is a solitary authority. It has been distinguished in every case in which it has been cited.

Cur. adv. vult.

May 8. Low J. read the following judgment:—In this action the plaintiffs claim from the defendants sums amounting to 958*l.* 1*s.* 7*d.*, which is the plaintiffs' share of a pool formed under an arrangement to which I will refer hereafter. There is no dispute about the amount due to the plaintiffs if anything is recoverable.

The case was partly heard before me at Birmingham at the recent winter assize, and I then gave judgment disposing of certain matters. In the action as opened at Birmingham the secretary to the association, which is a combination of persons interested in the manufacture of cased tubes which are used chiefly in the construction of bedsteads, was made a party, the relief sought against him being in respect of an alleged breach of authority. This allegation was abandoned by the plaintiffs, and I therefore dismissed the secretary from the action. The same result occurred with regard to the

(1) [1913] A. C. 781, 797. (2) [1912] A. C. 421.
(3) 24 Q. B. D. 252.

defendants who were joined as trustees of the association, no evidence being given that the defendants in question were trustees; on the contrary uncontradicted evidence was before me that no trust existed at all. I also held at Birmingham, after hearing evidence and considering the documents, that the returns referred to in par. 3 of the defence of the association had been in fact prepared by the secretary during the monthly examination of the members' books, and not by the plaintiffs, and that in those circumstances a statutory declaration by the plaintiffs was not a condition precedent as claimed by par. 4 of the defence. If my judgment as hereinafter given is correct, this finding is not now material. The defendants by pars. 14 and 15 of their defence raised important points of law, and by arrangement those points were reserved for argument before me in London, and after hearing arguments of counsel I reserved my judgment.

The point for decision really arises upon par. 14 of the defence, which contends that this action is not maintainable, on the ground that the rules of the association and the agreement sued on are contrary to public policy as being in restraint of trade. The defendants under par. 15 took a further point under the Trades Union Act, 1871, and said that the agreement was not enforceable by reason of s. 4 of that Act. This point was not pressed, and I do not understand that I have to deal with it. Some twenty years or more ago an association called the Cased Tube Association was formed, and it consists at the present day of the plaintiff company and the various persons and firms named as defendants, and who have not already been dismissed from this action. Revised rules were made by the association on March 26, 1907, which state that the object of the association is the regulation of prices and the taking of such action for the protection of the interests of the members as may from time to time be decided upon. The scheme, briefly stated, is that members whose turnover should fall below a fixed percentage of the trade shall be compensated by payment out of a fund created by payments in from members whose turnover exceeds their fixed percentage, and it is the sums due to the plaintiffs out of this pool that they are seeking to recover in this action. I leave the rules for a moment and pass to the agreement under which this action is brought and which in effect incorporates the rules,

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It is dated June 24, 1913, and is made between five bedstead manufacturers of the first part, the plaintiff company of the second part, the Cased Tube Association (which I have said includes all the defendant firms and companies) of the third part, and the Manufacturers Investments, Limited (which was a company apparently formed in connection with the activities of the association but with regard to which nothing arises in this case), of the fourth part. This latter company merely joined in the agreement as sureties, and is not a party to this action. The agreement recites that the five manufacturers are, among others, proprietors of shares in the plaintiff company, and proceeds to state that the association (par. 1) fixes the plaintiff company's percentage for pool purposes as 6·81 per cent. Par. 2 confines the plaintiff company's trade to be exclusively with the five firms of manufacturers of the first part. Par. 3 restricts the five manufacturers to obtain cased tubes only from members of the association. Par. 6 provides that the agreement shall continue in force so long, but only so long, as both the Cased Tube Association and the Bedstead Manufacturers Federation continue to control prices. I now return to the rules. Rule 21 provides that the association "terms"—that is, the terms on which the association members may sell their goods—shall be as stated in the price lists issued from time to time. Rule 22: "Every member shall charge the basis prices, extras, and discounts as set out in the price list of the association adopted 23 December, 1904, and confirmed 23 January, 1908, or such other prices as may be fixed upon from time to time by the association in general meeting." Rule 36: "No contract shall be allowed. No orders may be taken beyond the amount the member can supply in one month from the date order is received, except on the understanding that orders are subject to an alteration of discounts after each month's supply is delivered. But in the case when bank holidays intervene an extra week shall be allowed." The defendants contend that this agreement and the rules, especially the three rules I have referred to, constitute such an unreasonable restraint of trade as to render the contract unenforceable. Questions as to the validity of restraints on trade have frequently come before the Court, sometimes in the case of contracts for services, sometimes in the case of contracts for sale and transfer of businesses, and sometimes,

as in the present case, have arisen out of a manufacturing or commercial contract. The principles which should guide the Court have been recently repeated and summarized by Lord Parker in the case of *Herbert Morris, Ld.* v. *Saxelby*. (1) There, referring to Lord Macnaghten's judgment in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (2), Lord Parker says "As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint." In the next paragraph he says: "It will be observed that in Lord Macnaghten's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public. With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed." Mr. Lawrence in argument stated that he did not dispute that in this case special circumstances existed justifying some amount of restraint, such special circumstances being a wish to have some control—which I must take to mean a reasonable control—over the prices at which the goods of the trade should be sold. He also admitted that he had no evidence, and did not assert, that the arrangements were in any specific way which could be proved injurious to the public, and he based his whole resistance to the plaintiffs' claim upon the first of Lord Macnaghten's

(1) [1916] 1 A. C. 688, 706, 707. (2) [1894] A. C. 535.

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two conditions, namely, that the restraints imposed are unreasonable in the interests of the contracting parties. In considering the rules and the agreement they certainly appear to be most drastic, and the powers exercisable by the association over its members to be almost unlimited. For instance, rule 21, which deals with "terms," places no limit of any sort or kind upon the restrictions which may be placed upon members' terms of trading, and in the same way rule 22 places no limit whatever to the restriction upon prices; the terms and prices are simply to be those which from time to time the majority of the members may see fit to impose. It also appears that, so far as the rules are concerned, there is no limit in point of time to the restrictions to which members must submit, and, as far as I have been able to find, no means are provided whereby a member can extricate himself from the fetters which the rules enable the association to put upon him. It is true that rule 35 has a heading "Resignation or Retirement of Members," but the rule itself appears merely to provide for their expulsion. Then rule 36 has the astonishing provision "No contract shall be allowed." Of course this cannot be taken literally as it would stop all business, and I take it that it must mean that members' transactions must be from hand to mouth so far as sales are concerned, and that they must not in any way bind themselves beyond the moment. Coming then to the agreement, I find that it restricts the plaintiff's trade solely to five firms without making any provision for one or more of those firms, or indeed all of them, ceasing to do business; and again it contains no way by which the plaintiff company or the five firms of manufacturers, whose trade is also restrained, can terminate the arrangement, and it specifically provides that the arrangement shall continue so long as the two bodies continue to exist, whose extinction is quite beyond the power of either the plaintiff company or the five firms; and in the same way it binds the five firms to deal only with the members of the association, not, however, necessarily with the plaintiff company at all. Mr. Disturnal referred to Lord Haldane's judgment in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1), and relied upon the argument that the parties must be taken to know their own business best, and that it was unlikely that anything would be done which could be looked

(1) [1914] A. C. 461, 471.

upon by any of the parties as unreasonable; and of course one is impressed with this argument up to a certain point. It is, however, quite contrary to experience that oppressive powers will not be exercised oppressively merely because inconvenience may, or even must, result to the oppressor. It appears to me quite impossible to hold that the restraints to which the cased tube trade, the plaintiff company, and the Bedstead Manufacturers' Federation, parties to this agreement, are subject can be said from any point of view to be reasonable, or justified by any circumstances with which I have been made acquainted. I am of opinion that, having regard to any special circumstances that may exist between these parties, the restraints are out of all reason. It was said on behalf of the plaintiffs that, although the restraints might be unenforceable, the money claim might still be upheld, and in support of this the instance of the recovery of wages under a service contract containing an unenforceable restraint on trade was adduced. In my opinion this argument fails, because in the case before me the restraints go to the root of the contract, and are its real basis, and to enforce this money claim would be really to assist in carrying out that which was the sole object of these parties, namely, to restrain and control the cased tube trade in a wholly unreasonable and, it seems to me, quite a tyrannical manner.

For these reasons I think that the plaintiffs' claim upon an account stated also fails, as the sole basis for the account is the arrangement which I hold to be illegal. My judgment must therefore be for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Moore, Bayley & Co., Birmingham.*
Solicitors for defendants: *David Davis & Oreton, Birmingham.*

J. F. C.

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April 19, 20;
May 8.

[IN THE COURT OF APPEAL.]

In re an Arbitration between L. SUTRO & CO. and HEILBUT, SYMONS & CO.

Contract—Sale of Goods—Conveyance by particular Route—Printed Form of Contract—Terms of Contract—Evidence of Usage as to alternative Route—Admissibility of—Inconsistent with Contract.

By a contract dated March 27, 1916, in the printed form of contract for cost, freight, and insurance issued by the Rubber Trade Association of London, April, 1913, with the necessary additions thereto written in, the appellants agreed to sell to the respondents twenty-five tons of plantation rubber, c.i.f., "to be shipped during the months of March/April, 1916, by vessel or vessels (steam or motor) from the East to New York direct, $\frac{\text{and}}{\text{or}}$ indirect, with liberty to call $\frac{\text{and}}{\text{or}}$ tranship at other ports"; any question regarding quality to be settled by arbitration, which was to be demanded and held within a certain time "after the arrival of the vessel"; samples to be taken in the presence of representatives of buyers and sellers, and "failing sellers naming their representatives on or before arrival of vessel," the buyers' samples to be accepted; and payment to be by "cash against documents in London on or (at buyers' option) before arrival of vessel or vessels at port of discharge."

The sellers made a declaration under the contract of fifteen tons as having been shipped per steamship via Seattle under a through bill of lading, which stated that the goods were shipped at Singapore for New York via Seattle (a port on the Pacific coast of the United States, whence they would be sent by rail to New York). The buyers objected to this declaration as irregular, upon the ground that the rubber was to be conveyed by sea to New York. The dispute was referred to arbitration under a clause in the contract, and the arbitrators found that after the outbreak of war great difficulty was experienced in obtaining space for shipments from the East, and in consequence in October, 1915, shipments to the eastern States of the United States, which had before gone the whole distance to New York by water, began to be made by steamer to a port on the western seaboard of the United States, whence they were transmitted by rail to destination; that at the date of the contract this route from the East by sea and rail from the Pacific seaboard was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in the form of the one in question; that there was, at the date of the contract, such a course of business established as would make it within the contemplation of the parties that the rubber might come by this route; and that goods forwarded by such a route would be a good tender under

the contract. They accordingly awarded that the tender was good, and that the buyers were bound to accept the same :—

Held by Swinfen Eady L.J. and Bray J., Scrutton L.J. dissenting, that the contract provided for a sea carriage from the port of loading to New York ; that the usage (assuming it was a usage) found by the arbitrators was inconsistent with the terms of the contract, and therefore was not applicable thereto ; and that the tender was not a good tender and the buyers were not bound to accept the same.

Judgment of Lush J. [1917] W. N. 5 affirmed.

APPEAL from the judgment of Lush J. upon an award in the form of a special case. (1)

By a contract dated March 27, 1916, in the printed "Form of Contract for Cost, Freight and Insurance (or Cost and Freight) issued by the Rubber Trade Association of London. April, 1913," Messrs. Heilbut, Symons & Co. (called the sellers) sold to Messrs. L. Sutro & Co. (called the buyers), upon the terms of the printed constitution and rules of the Rubber Trade Association of London, "the following plantation rubber, viz. : About twenty-five (25) tons Hevea Crepe, sellers to obtain all necessary permits, at three shillings and five pence (3/5) per lb. cost, freight and insurance, shipping weights."

The rest of the contract, with the marginal notes, was as follows, the words in italics being written in :—"Insurance. To be insured *by sellers against marine and war risk insurance* with particular average at the price of this contract *plus 10 °/₀*.

"Shipment. To be shipped during the months of *March/April 1916* by vessel or vessels (steam or motor) from *The East* to *New York* direct, $\frac{\text{and}}{\text{or}}$ indirect, with liberty to call $\frac{\text{and}}{\text{or}}$ tranship at other ports ; but if to France, no transhipment west of Port Said, except at a French port, or by force majeure.

"Guarantee of quality. *Quality equal to type H114 in selling brokers' possession.* Any question regarding quality to be settled by arbitration, such arbitration to be demanded within twenty eight days, and held within six weeks after the arrival of the vessel.

"Weight. The goods to be weighed at buyers' expense at the port of discharge named in the contract, or duly declared by the buyers according to the contract ; and buyers shall furnish, where sold on delivered weights, as soon as possible, a properly certified

(1) [1917] W. N. 5.

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copy of landing weights. Each shipment, if by more than one vessel, and each mark or countermark to be treated separately.

"Declaration of shipment. The name of the vessel or vessels, marks and full particulars to be declared to the buyers in writing with due despatch.

"Sampling. If to ports other than London, samples to be drawn and sealed in the presence of representatives of buyers and sellers, or if in London, by the Port of London Authority or wharfingers, and forwarded to selling brokers in London. Failing sellers naming their representatives on or before arrival of vessel, the buyers' accredited sealed samples to be accepted.

"Loss or transhipment. Should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled, so far as regards such lost vessel or vessels on the production of the bill or bills of lading, or other satisfactory proof of shipment by sellers, so soon as fairly practicable after the loss is ascertained. Should the vessel or vessels, after declaration, and the goods or any portion thereof be lost, this contract to be cancelled for the whole or such portion (as the case may be) unless the goods shall have been previously paid for, but should the vessel or vessels be lost and the goods or any portion thereof be transhipped to some other vessel or vessels, and arrive on account of the original importer, this contract to stand good for such portion.

"Payment. Cash against documents in London on or (at buyers' option) before arrival of vessel or vessels at port of discharge.

"Arbitration. Any dispute arising out of this contract to be settled by arbitration in London in the usual manner, according to the constitution and rules of The Rubber Trade Association of London."

A dispute arose out of the contract, and it was duly referred to arbitration, and an award was made in favour of the sellers. The buyers appealed, in accordance with the rules of the Rubber Trade Association, to the committee of the association. Upon the hearing of the appeal the committee found the facts (so far as material) as follows:—On June 5, 1916, a formal declaration was made by the sellers under the contract of fifteen tons (part of the twenty-five tons) having been shipped for the steamship *Lycaon/Teucer* via Seattle under a bill of lading dated April 30, 1916. This declara-

tion the buyers objected to as irregular (1), and demanded arbitration to settle the dispute. The fifteen tons (together with the remaining ten tons, as to which no question arose) were shipped at Singapore in due time in accordance with the contract, and a through bill of lading, dated April 30, 1916, was issued by the shipowners' agents for delivery at the port of New York via Seattle (a port at a railway terminus on the west coast of the United States), with liberty to the shipowners to tranship to any other vessels, or to forward by rail. The shipping documents included a policy of insurance on the goods "at and from Singapore via Hong Kong and Seattle to New York" against all loss or damage of whatsoever nature and howsoever caused (including war risks) until safely delivered into warehouse at destination, and for fifteen days after arrival at such destination. No objection was taken to the form of the policy.

Paragraphs 9—14 of the case were as follows:—"9. After the outbreak of war great difficulty was experienced in obtaining space for shipments from the East, and in consequence of this difficulty in about October, 1915, shipments to the eastern States of the United States which had hitherto gone, directly or indirectly, the whole distance to New York by water began to be made by steamer to a port on the western seaboard of the United States, whence they were transmitted by rail to destination. 10. At the date when the said contract was entered into this route from the East by sea and rail from the Pacific seaboard was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in the form of the one now in question. 11. If and so far as it be material, we find that there was, at the date of the contract, such a course of business established as would make it within the contemplation of the parties to this contract that the goods in question might come by this route. 12. We further find, if and so far as it may be a question of fact, that goods forwarded by such a route would be a good tender under such a contract. 13. We further find, if and so far as it be a question of fact, that the shipment was duly made in accordance with the terms of the contract. 14. Subject to the opinion of the

(1) The ground of the objection was that the rubber would be sent from Seattle by railway to New York instead of coming by sea the whole way.

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Court on the above findings of fact we find and award that the tender was a good tender and the buyers were bound to accept same." In the event of the Court being of opinion on the above findings of fact that the tender was not a good tender the committee awarded and directed that the buyers were not liable to accept same.

Lush J. held that the contract was clear and unambiguous ; under it the goods were to be conveyed by sea from the port of loading to New York ; and that evidence of the usage would contradict the written contract and was therefore not admissible. He accordingly answered the question in favour of the buyers that the tender was not a good tender. The sellers appealed.

Roche, K.C., and *A. Neilson*, for the sellers. The usage does not contradict the written contract so as to make evidence of it inadmissible. Evidence of a usage which does not contradict the written contract, but merely annexes an incident or superadds a right to it, is admissible : *Wigglesworth* v. *Dallison* (1) ; *Hutton* v. *Warren*. (2) " Merely that it varies the apparent contract is not enough to exclude the evidence ; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less " : *Brown* v. *Byrne*. (3) In *Humfrey* v. *Dale* (4) Lord Campbell C.J. said that whether the evidence of usage " be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material." *Myers* v. *Sarl* (5) affords an instance of the admission of evidence to explain a word in a contract which has acquired a peculiar meaning in the trade. In that case Blackburn J. (6) cited with approval the statement of the law in the notes to *Wigglesworth* v. *Dallison* (1) in 1 Smith, L. C., 5th ed., 529 ; 12th ed., 622, 623. Evidence of a usage may be given to define the method of performance : *Produce Brokers Co.* v. *Olympia Oil and Cake Co.* (7) In the present case the usage shows that one method of performing this contract is to send the goods by sea to Seattle and thence by rail to New York. In the same way

(1) (1779) 1 Doug. 201 ; 1 Sm., L. C., 12th ed., 613.
(2) (1836) 1 M. & W. 466.
(3) (1854) 3 E. & B. 703, 715.
(4) (1857) 7 E. & B. 266, 274 ; affirmed, (1858) E. B. & E. 1004.
(5) (1860) 3 E. & E. 306.
(6) Ibid. 319, 320.
(7) [1917] 1 K. B. 320, 331.

when goods are shipped from New York to London a usage that they should be sent by rail from Southampton would not contradict the contract. " Arrival of the vessel " in the contract is an expression used for the purpose of fixing the termination of the transit, and means arrival of the goods. The " port of discharge " in the printed form means in this case New York. Under the test applied by Channell J. in *In re Walkers and Shaw, Son, & Co.* (1) the usage introducing the words " with liberty to send the goods by rail from the Pacific Coast to New York " is not inconsistent with the contract, any more than is the custom to add the days of grace for payment of a bill of exchange inconsistent with the contract on the face of the bill. The usage explains the words " To be shipped by vessel or vessels from the East to New York direct $\frac{\text{and}}{\text{or}}$ indirect." The written words ought to have greater effect given to them than the printed words : *Glynn* v. *Margetson & Co.* (2) ; and a business sense ought to be given to business documents. (3) [*Stephens* v. *Wintringham* (4) and *Produce Brokers Co.* v. *Olympia Oil and Cake Co.* (5) were also referred to.]

Leslie Scott, K.C., and *Barrington-Ward*, for the buyers. The contract means that the goods shall be carried by a ship from the port of shipment to the port of discharge, New York. It was a breach of that contract to send the goods by rail from Seattle to New York. The usage found by the committee is inconsistent with the contract. There are business reasons why the buyers stipulated for conveyance by sea. The ship in which the goods are conveyed is reported from various stations, and the buyers consequently know when it will arrive at its destination, and can make arrangements to take delivery of the goods and to pay for them. If they are sent by rail from Seattle they may be greatly delayed in transit across America owing to the congestion of traffic caused by the war, and the date of their arrival will be quite uncertain, and the buyers cannot tell where they are delayed. Moreover, the trucks containing the goods may arrive at different times. The buyers would not know when to make arrangements for payment. But, as Lord Cairns L.C. pointed out in *Bowes* v. *Shand* (6), the Court will not inquire into the

(1) [1904] 2 K. B. 152, 158.
(2) [1893] A. C. 351, 354, 358.
(3) Ibid. 359.
(4) (1898) 3 Com. Cas. 169.
(5) [1916] 1 A. C. 314, 330, 331.
(6) (1877) 2 App. Cas. 455, 463.

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reason why the stipulation is inserted in a mercantile contract. If the contract is clear the Court will not inquire into the reasons why the buyers desired the goods to come the whole way by sea. The contract on its face is clearly a contract for sea carriage to New York. In *Hutton* v. *Warren* (1) Parke B., referring to *Senior* v. *Armytage* (2), said that "it would appear that the Court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it": see also *Myers* v. *Sarl* (3); *The Alhambra* (4); *In re North Western Rubber Co. and Hüttenbach & Co.* (5) Each case depends upon its own facts. The contract in the present case excludes the usage. The whole tenor of the contract must be looked at, and it clearly shows the intention that the goods should be carried all the way by sea.

Next, the finding of the committee does not amount to the finding of a custom or usage. In *Dickenson* v. *Jardine* (6) Willes J. said: "With respect to the alleged custom, it was not proved, the evidence at most showing only a practice adopted in undisputed cases." That exactly describes the practice in the present case which had only been in existence a few months. The number of cases must therefore have been small.

A. Neilson in reply.

Cur. adv. vult.

May 8. SWINFEN EADY L.J. read the following judgment:— Messrs. L. Sutro & Co. were the buyers of a quantity of rubber under a c.i.f. contract dated March 27, 1916. On June 5, 1916, the sellers made a formal declaration under the contract of fifteen tons, as having been shipped per the steamship *Lycaon/Teucer* via Seattle, under a bill of lading dated April 30, 1916. The buyers objected to the declaration as irregular, and demanded arbitration to settle the dispute. An award was made in favour of the sellers and the buyers appealed, in accordance with the rules of the Rubber Trade Association, to the committee of the association, and the committee made their award in the form of a special case. Lush J. held that

(1) 1 M. & W. 477.
(2) (1816) Holt N. P. 197.
(3) 3 E. & E. 306.
(4) (1881) 6 P. D. 68.
(5) [1908] 2 K. B. 907, 922.
(6) (1868) L. R. 3 C. P. 639, 644.

the tender to the buyers was not a good tender under the contract; and in that event the award that the buyers were not liable to accept the same took effect. From the decision of Lush J. the sellers now appeal.

There is a contract in writing between the parties. The buyers contend that the written terms provide for rubber being shipped from the East and carried to New York in one or more ships, and that the date of the arrival of the vessel or vessels at the port of discharge (New York) governs the date at which the buyers must pay cash against documents. The sellers contend that under the contract they are entitled to ship from the East via Hong Kong, where transhipment takes place, to Seattle, and thence by railway across America, some 3000 miles, to New York; that at the date of the contract a practice had arisen, beginning some six months previously, to send rubber by that route instead of the whole way by sea, as had previously been the case; that such route had become one of the usual routes for rubber from the East; and that it was within the contemplation of the parties to the contract that the goods in question might come by that route, that is, partly by sea and partly by railway. The buyers reply that evidence of such a practice is not admissible, in order to annex it as incident to the contract, as it would contradict the express terms of the contract. They further urge that from a business point of view it would work a variation of the contract most prejudicial to them; that with sea-borne goods they can calculate approximately when the vessel may be expected to arrive, and can make their business and financial arrangements accordingly, but that with goods coming by railway for so great a distance there would be no way of ascertaining the probable date of arrival, even within a month or two, or to ascertain where the goods were at any date, or even whether they would all arrive in wagons forming part of the same train, or, if not, what interval of time there would be between the arrival of the different parcels, or for what date they would have to make their arrangements for payment or delivery on resale. Their objection to the long land transit is the uncertainty of the date of arrival and the impossibility of ascertaining the probable date beforehand, and not any question of delay. It is not, however, necessary for them to justify in a Court of law the mercantile reasons for inserting any particular stipulation in a

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contract. The observations on this point of Lord Cairns in *Bowes* v. *Shand* (1) are very relevant. After construing the contract in question in that case he proceeded to say : " My Lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any Court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer. But, if necessary, a farther answer is obtained from two other considerations." Then he refers to the two other considerations in detail. The Court assumes that a merchant, in entering into a mercantile transaction, has regard to his arrangements for paying for goods purchased, and his intention about reselling them in the ordinary course of his trade.

The contract in question here is dated March 27, 1916, and is made in the form of a contract for cost, freight, and insurance business issued by the Rubber Trade Association of London in April, 1913. At this date rubber was carried from the East to New York by sea, either round Cape Horn or via the Panama Canal. [The Lord Justice referred shortly to the terms of the contract.] Thus not only does the contract provide in express terms that the rubber is " to be shipped . . . . by vessel or vessels (steam or motor) from the East to New York," but the whole context of the instrument shows that it was intended that the rubber was to be carried in and by a vessel or vessels to its ultimate destination, which is referred to as the " port of discharge." Throughout the contract times are fixed by reference to the arrival of the vessel or vessels. Thus any question regarding quality is to be settled by arbitration, " such arbitration to be demanded within twenty-eight days and held within six weeks after the arrival of the vessel." Sellers are to name their representatives, to attest the drawing and sealing of samples, " on or before arrival of vessel." Again, things are agreed to be done at or by reference to " ports " or " the port of discharge." The sellers cannot demand cash against documents " before arrival of vessel or

(1) 2 App. Cas. 463.

vessels at port of discharge." The goods are to be weighed at buyers' expense at the port of discharge named in the contract; and buyers are to furnish, when sold on delivered weights, a properly certified copy of "landing weights." Again, the name of the vessel or vessels is to be declared to the buyers in writing with due despatch. Again, provision is made for the consequences of the vessel or vessels applying to the contract being lost, either before or after declaration; and in the case of the vessel or vessels being lost, but the goods or some portion thereof being transhipped to some other vessel or vessels, and arriving on account of the original importer.

I am satisfied, from a consideration of all the terms of the contract, that it only contemplates and provides for a sea carriage from the loading port to the ultimate port of discharge, and that the express terms of the contract are quite inconsistent with a long railway carriage. The printed form was obviously settled in April, 1913, with reference to the only route then used for the carriage of rubber, namely, a sea route all the way, and its terms are inapplicable to and inconsistent with land carriage. The contract is to send by a specified method of conveyance—by ship. This is a usual method, and the route by sea is a usual route. Where a method of conveyance and route, namely, a sea route, are specified, it is immaterial that there may co-exist some other usual mode of conveyance and route. The terms of the contract must be observed. The arbitrators have not found that any trade usage in fact existed to send rubber to New York via Seattle and across the continent of America. They say that in or about October, 1915, shipments to the eastern States of the United States, which had hitherto gone directly or indirectly the whole distance to New York by water, began to be made by steamer to a port on the western seaboard of the United States, whence they were transmitted by rail to destination. This was after the outbreak of war, and owing to the great difficulty experienced in obtaining space for shipments to the eastern States. This is very far from a finding of any established trade usage or custom. Any such usage, if found, would be inconsistent with the terms of the written contract, and repugnant to them, and therefore inadmissible to annex a new term or condition to the contract. It is not like a case where words or phrases employed in commerce are alleged to have been used in some special technical sense other than

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their ordinary sense. Moreover, the whole context of the contract shows that the parties were employing the words used in their ordinary sense. Again, if there were any words used of ambiguous meaning, it must be remembered that greater regard is paid to the intention of the parties, as appearing from the instrument when construed as a whole, than to any particular words they may have used to express their intention : see *Ford* v. *Beech*. (1)

With regard to paragraphs 10, 11, and 12 of the special case, I may say that it is not open to arbitrators by such findings to vary the express contract between parties, or to decide otherwise than in accordance with the legal rights of the parties. Their finding does not indicate that the words used have any other than their ordinary and popular meaning, or that the mode of conveyance by vessel or vessels to a port of discharge does not extend to mean water carriage all the way. Their finding only amounts to this, that there are other usual routes for rubber than an all-sea route, and that where rubber is forwarded by a mode of conveyance other than that specified in the contract buyers sometimes accept delivery.

Occasionally a question of ambiguity arises by reason of a printed form being used, the terms of which, or some of them, are manifestly inapplicable to the contract into which the parties are entering ; and it has been said that " a business sense will be given to business documents " : see *Glynn* v. *Margetson & Co.* (2) No such question or ambiguity arises in the present case. The language throughout the form is entirely appropriate to carriage by water, and only appropriate to such carriage, and is obviously only intended for sea carriage. It is irrelevant to urge that there may be contracts entered into which involve some land carriage, and if this form were used to ask, How would the printed parts of it then be construed —e.g., reference to " a vessel or vessels " and to " the port of discharge " ? The answer is that, if land carriage wholly or partly is intended, an appropriate form or language should be adopted ; but that the form in question is not appropriate or indeed intended for such a purpose. Again, where a particular method of conveyance is stipulated for, it is not permissible to inquire whether there is not some other usual method ; and a finding that there is another usual method is irrelevant.

(1) (1848) 11 Q. B. 852, 866. (2) [1893] A. C. 359.

The careful judgment of Lush J. is, in my opinion, correct, and for the reasons given by him, and this appeal should be dismissed.

SCRUTTON L.J. read the following judgment :—This is an appeal from a decision of Lush J. on a special case stated by the committee of the Rubber Trade Association to raise the question whether a tender of certain documents pursuant to a c.i.f. sale of fifteen tons of rubber is a good tender.

The contract in question was dated March 27, 1916, and its terms were filled in on a printed form called " Form of Contract for Cost, Freight and Insurance (or Cost and Freight) issued by the Rubber Trade Association of London. April, 1913." The subject-matter was twenty-five tons plantation rubber Hevea Crepe. The printed form ran " To be shipped during the months of —— by vessel or vessels (steam or motor) from —— to —— direct, or indirect, with liberty to call $\frac{\text{and}}{\text{or}}$ tranship at other ports." The blanks were filled in in writing so that the contract read : " To be shipped during the months of March/April 1916 by vessel or vessels (steam or motor) from the East to New York," &c. When the printed form of contract was settled we were told that the usual route from the East to New York was entirely by sea round Cape Horn. Then or later a sea route through the Panama Canal became an alternative usual route. After the outbreak of war the scarcity of ships led to another alternative route becoming usual, and the arbitrators find as facts : [The Lord Justice read paragraphs 9, 10, and 11 of the special case.] The vendors accordingly shipped in the East within the contract time twenty-five tons of rubber answering the description in the contract under a bill of lading to " New York via Seattle," a railway terminus on the west coast of North America, with power to the shipowners " to forward by rail . . . . to be subject to the conditions and exceptions of the forwarding conveyance." They also effected a policy of insurance " from Singapore via Hong Kong and Seattle to New York," " against all loss or damage of whatsoever nature and howsoever caused " from warehouse to warehouse " at destination, and for fifteen days after arrival at such destination."

The sellers declared this shipment under the contract, and the buyers objected to this declaration as irregular on the ground that the transit from Seattle to New York was by land, and claimed

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arbitration on the regularity of the declaration. It does not appear whether the shipping documents were in fact tendered. The arbitrators find that "no objection was taken to the form of the policy," but it is not quite clear whether this means at the time of tender, or at the arbitration; probably the latter.

The arbitrators find in paragraph 12: "We further find, if and so far as it may be a question of fact, that goods forwarded by such a route would be a good tender under such a contract." As to this it may be remarked that the tender would not be of goods, but of documents relating to goods. Paragraphs 13 and 14 are as follows: [The Lord Justice read them.] The latter paragraphs and paragraph 16, which says "In the event of the Court being of the opinion . . . . that the tender was not a good tender," look as if the arbitrators were dealing with the validity of the tender, not with the validity of the declaration; but the question appears to be the same —whether a shipment in the contract time of goods of the contract description to be forwarded by sea to Seattle, and thence by rail to New York, with a contract of carriage for such journey, and a policy covering all risks on such journey, was a compliance with the terms of the contract of sale.

The purchasers appear to have argued before Lush J. that the arbitrators were really trying to incorporate a custom or usage inconsistent with the contract, for they pointed out that the printed form appeared to assume throughout a sea transit. The arbitration as to quality was to be six weeks "after the arrival of the vessel." Sellers were to name their representatives "on or before arrival of vessel." Payment was "Cash against documents in London on . . . . arrival of vessel . . . . at port of discharge."

Lush J. was of opinion that the contract was clearly for sea transit throughout; that if there was a usage or custom of trade at all it was contradictory of the written contract, and could not therefore be applied to the contract, and that therefore the decision of the commercial arbitrators was erroneous. The vendors appeal.

The first thing that strikes me is that the particular adventure of the contract is written into a printed form applicable to all sorts of transits, particulars of which are to be filled in, and a form parts of which may be inapplicable to the particular adventure written in. For instance many c.f.i. contracts must involve some land transit.

I put the case of a sale of "rubber c.f.i. Birmingham" for the large motor works there, written into this form, where the rubber would almost certainly be forwarded by rail from the discharging port of the vessel. Similar cases can easily be suggested in connection with sales carried out by through bills of lading from or to the interior of the United States or Canada. How would the printed form about vessels and "ports" of discharge be applied to such written particulars? The answer has been given by the House of Lords in *Glynn* v. *Margetson & Co.* (1), where an adventure of carrying perishable fruit from Spain to England was written into a printed form which gave very wide powers of deviation. Lord Herschell expressed himself thus (2): "Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent." Lord Halsbury's words are (3): "Looking at the whole of the instrument, and seeing what one must regard . . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract"; and he speaks of "the difference between the ordinary and formal parts of the document which are to be found in print and the written parts." Lord Penzance in *Dudgeon* v. *Pembroke* (4) had said: "The practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in Courts of law." Indeed these learned Lords were only applying the language of Lord Ellenborough in *Robertson* v. *French* (5): "The words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense

(1) [1893] A. C. 351.
(2) Ibid. 355.
(3) Ibid. 357.
(4) (1877) 2 App. Cas. 284, 293.
(5) (1803) 4 East, 130, 136.

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and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

What then was the real adventure of the parties in this case? The purchaser wanted rubber of a particular description in New York shipped at a given time in the East, at a price which was to include the cost of carriage under a usual contract of carriage and the cost of insuring all risks under a usual form of policy. Where there is a contract to carry from A to B if the exact route or method of carriage is not specified in the contract, the carriage must be by one of the usual routes and methods of carriage, at the option of the carrier. If the other party wishes to exclude some usual route or method of carriage, he can do so by inserting such a term into the contract, but in the absence of such a term the option of selecting a usual method of performance is with the person who has to perform. What is a usual route or method is a question of fact to be found by the arbitrators, and they have found as a fact that when the contract was entered into the route from the East by sea and rail from the Pacific seaboard was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in this form, and that there was such a course of business established as would make it within the contemplation of the parties to this contract that the goods might come by this route. This is a finding of fact by the appropriate tribunal to find facts, and we have no power to review it.

It was attacked, as I understood, in two ways; first, it was said that a usage or custom could not spring up in so short a time, and there could only be an occasional acquiescence which did not make the route a usual route. Customary procedure, as Lord Blackburn said in *Postlethwaite* v. *Freeland* (1), "did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port"; which was again defined by the Court of Appeal in *Newall* v. *Royal Exchange Shipping Co.* (2), "a practice so general and universal in the trade . . . . that every one shipping goods there must be taken to know that other

(1) (1880) 5 App. Cas. 599, 616. (2) (1885) 33 W. R. 868.

people's goods, if not his goods, might probably be stowed on deck." A usual route need not be the invariable route. In *Evans & Co.* v. *Cunard Steamship Co.* (1) a route followed in half the recorded cases was held by Wills J. a usual or customary route. I do not feel myself at liberty to speculate whether the arbitrators ought or ought not to have made this finding. They are the judges of fact, and they know much more about the trade than I do ; and I do appreciate that in war-time methods of business alter and crystallize very rapidly.

If then this was a usual route for rubber from the East to New York, has it been excluded by the terms of this contract from the means of performance open to the vendor ? So far as the writing is concerned, the only excluding term that can be suggested is that the insurance is " marine." But, first, " marine " in the clause in question is contrasted with war risks, risks of transit with risks of war ; and, second, a policy does not cease to be " marine " because it includes land insurance : see *Harding* v. *Bussell.* (2) But it was said that the usual route which went partly by land was excluded by the references to " vessels " in the printed part of the contract, which showed that the contract related only to usual sea routes. I am clear that if the only route had been partly by land these references to vessels being in a printed form would have been construed as applying either to the auxiliary conveyance, rail or lighter, which replaced the vessel, or to the goods which after all were the main object of the contract ; and I have come after careful consideration to the clear conclusion that where one of the usual routes is a land route the fact that the printed form used refers only to " vessels " and is not altered is not enough to cut that usual route out of the contract. The purchasers' counsel suggested that there was a good business reason for excluding a land route, in that there would be greater uncertainty and delay on the railway than by sea. On this, which is a question of fact, the arbitrators have made no finding, and I have no materials for forming an opinion, though I should have doubted whether, in view of the fact that the consignment might come by several ships, direct or indirect, with liberty to tranship, and of the well-known difficulties of labour in discharging, there were not considerable, if not equal, uncertainty and delays in sea transit. The fact that the land route has become one of the usual routes does

(1) (1902) 18 Times L. R. 374. (2) [1905] 2 K. B. 83.

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not suggest any marked advantage in favour of sea transit; and I am impressed by the finding of the arbitrators not only that this was a usual route, but also a usual route under this contract, the printed terms of which are supposed to exclude it. I strongly suspect that the real cause of the buyers' action is the undoubted fall in market price, but it is not material whether my suspicion is or is not justified.

I have come therefore to the same conclusion as the independent commercial men in the trade, but I should like to add this: Business men frequently complain of what they consider the technical and unbusiness-like methods of lawyers in approaching commercial contracts. I think such business men should consider how much of the difficulty is due to the fact that many business men (even if they have clearly thought out what they mean, which does not always happen) frequently do not take the trouble to see whether the form in which they have expressed their meaning really expresses it. If in this case, a usual method of transit being partly by land, the contracting parties had thought, What do we intend this form in such a case to mean? they would certainly have made some alterations in the printed form of contract, and thus have moulded the printed language to their real intention, instead of leaving it to the Courts to do this, with less knowledge and more possibilities of error.

I am of opinion that the appeal should be allowed with costs here and in the Court below, and the decision of the arbitrators restored.

BRAY J. read the following judgment:—In this case the question arose under an award made by the Appeal Committee of the Rubber Trade Association in the form of a special case. Heilbut, Symons & Co. sold to L. Sutro & Co. twenty-five tons Hevea Crepe plantation rubber under a contract note dated March 27, 1916. The contract note was headed thus: "Form of Contract for Cost, Freight and Insurance (or Cost and Freight) issued by the Rubber Trade Association of London. April, 1913." It was in print, and the blanks had been filled in in writing. The important clause was the one described in the margin as "shipment": "To be shipped during the months of *March/April 1916* by vessel or vessels (steam or motor) from *The East* to *New York* direct, $\frac{\text{and}}{\text{or}}$ indirect, with liberty to call $\frac{\text{and}}{\text{or}}$ tranship at other ports; but if to France, no

transhipment west of Port Said, except at a French port, or by force majeure." The words in italics were in ink, the rest was the printed form. The sellers declared a parcel of fifteen tons, part of the goods, by a vessel to Seattle and thence by railway to New York under a through bill of lading. The buyers refused to accept the declaration and to take up the documents when tendered as not being in accordance with the contract, which they said provided for the goods coming entirely by sea and that they should have arrived in New York by a vessel. The sellers contended that they were entitled to so send the goods via Seattle under an established course of business existing at the time of the contract. The dispute was referred to arbitrators pursuant to a clause in the contract. The arbitrators found in favour of the sellers. The buyers appealed to the Appeal Committee, who made their award in the form of a special case, affirming the decision of the arbitrators subject to the points of law raised by the case. The material facts as to the established course of business are stated in paragraphs 9 to 14 of the case. The special case came before Lush J., who held that the course of business could not be applied to the contract, being inconsistent with the terms of that contract, and held that the buyers were entitled to reject the goods. The sellers appealed.

The points argued before us were two : first, whether the Appeal Committee had really found a custom; and, second, whether the custom if found could be read into the contract. The latter is the main and most important question, and I will deal with that first, of course on the assumption that a custom was found that the goods might be sent by vessel to a Pacific port, such as Seattle, and thence forwarded to New York by rail. The law on this point is now well settled. Evidence of a custom can be given in two cases : (1.) to interpret a business term or expression in a contract, and (2.) to annex an incident to the contract. It was contended here that the first case applied. That contention clearly fails. No one said or could say that vessel included rail. The main contention was that it was an incident or term annexed to the contract. In *Myers* v. *Sarl* (1) Blackburn J. stated the law to be as follows. After referring to the judgment of Lord Campbell C.J. in the case of *Humfrey* v. *Dale* (2), he continued : " The rule is still more correctly laid down

(1) 3 E. & E. 319, 320. (2) 7 E. & B. 266, 274.

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in Smith's Leading Cases, vol. 1, p. 529 (ed. 5) (1), in the notes to *Wigglesworth* v. *Dallison*, where, after setting out Parke B.'s judgment in *Hutton* v. *Warren* (2), the author thus proceeds:— 'From the above luminous judgment . . . . it may be collected that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent . . . . But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced, 1st, by the express terms of the written instrument, 2nd, by implication therefrom.' That I take to be the true rule of law upon the subject." The test, therefore, is whether this custom was consistent with the terms of the contract. Were the route or routes by which the goods were to be sent expressly or by necessary implication defined by the contract, and, if so, could they include the route by ship to Seattle and thence by rail to New York?

I have read the material clause which contains the words "by vessel or vessels from the East to New York," and these words are followed up by the words "with liberty to call $\frac{\text{and}}{\text{or}}$ tranship at other ports." Giving to these words their natural meaning, the goods are to go to a port, the port of New York. There are other clauses which convey the same meaning. [The learned judge read the other clauses of the contract, saying that the clause as to payment was very important.] All these words point, in my opinion, quite clearly to the goods arriving by vessel and at a port of discharge. The destination is to be the port of New York. The custom is that they should go to Seattle and arrive by rail at New York. In my opinion the custom is quite inconsistent with the express terms of the written instrument. It was argued that after the words "New York" there should be added the words "by one of the usual routes." That may be, but the usual route must be that of a vessel from the East to New York, and the place of arrival must be a port of discharge. Nothing can be implied which is contrary to the intention of the parties as shown by the written instrument. To imply that the goods could be sent by a route partly by land would be contrary to the terms of the contract. Reference was made to

(1) 12th ed., vol. 1, pp. 622, 623. (2) 1 M. & W. 474.

the case of *Glynn* v. *Margetson & Co.* (1), and especially to the words used by Lord Herschell (2): "These words are printed words in a document evidently intended to be used in relation to a variety of contracts of affreightment"; and it was said that the printed words here were intended to be used where the destination was an inland place. The case does not so state, and I decline to infer that this contract was intended to be so used without alteration. No business man could, in my opinion, read this contract without seeing that unaltered it was intended to be used only where the destination was a seaport, and that if the destination was to be an inland place it would have to be altered. There would be no difficulty in making the required alterations. All that was decided in *Glynn* v. *Margetson & Co.* (1) was that the written words should prevail over the printed words, and to that I agree; but there is no inconsistency here between the written words and the printed words. In my opinion this custom or practice, or whatever it be, cannot be read into this contract. This makes it unnecessary for me to decide whether the findings of the committee really show an established custom or practice, but I certainly do not differ from the criticism made by Swinfen Eady L.J. on this point.

In my opinion the judgment of Lush J. was right, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Tamplin, Tayler & Joseph.*
Solicitors for respondents: *Herbert Smith, Goss, King & Gregory.*

(1) [1893] A. C. 351. (2) Ibid. 354.

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[IN THE COURT OF APPEAL.]

SIMMS *v.* LILLESHALL COAL COMPANY.

Employer and Workman—Death by Accident—Compensation—Daughter of deceased Workman—Keeping House for Parent—Dependency—Total or Partial—Capacity of Applicant to maintain herself—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (1.) (*a*).

The applicant claimed compensation as sole dependant of her father, who was killed by accident at the respondents' colliery. Nine years before her father's death the applicant, who was then in domestic service, left her situation to go home and nurse her mother. The mother died a year afterwards, and the applicant then remained at home to keep her father's house. He clothed and provided her with board and lodging and gave her pocket money. She was a strong, healthy woman, and the county court judge, being of opinion that she was able to maintain herself by her own work and that her father's earnings were not therefore the sole source to which she could have looked for maintenance either at the time of his death or during the time when she kept his house, held that she was only a partial dependant, and awarded her compensation on that footing :—

Held, on appeal, that it was irrelevant to consider whether the applicant could have supported herself. She was in fact, at the time of her father's death, totally dependent on his earnings.

Moyes v. *William Dixon, Ld.* (1905) 42 S. L. R. 319 followed.

Appeal from an award of the judge of the Newport (Salop) County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant claimed compensation as sole dependant of her father, Thomas Simms, who was killed by accident at the respondents' colliery on February 9, 1916.

Simms at the time of his death was a widower. He had been married twice and had two children by his first wife and three by the second. All the children were married except the applicant and a younger sister, who was supporting herself in domestic service. Nine years before her father's death the applicant, who was then in service, left her situation and went home to nurse her mother, who was then ill. A year afterwards her mother died, and the applicant then remained at home to keep house for her father. He paid her

no wages, but clothed and provided her with board and lodging and gave her occasional pocket money.

At the hearing of the arbitration it was admitted by the respondents that she was partially dependent on her father, the only question being whether she was totally dependent on him. The county court judge held that she was only partially dependent on the ground that she was before and at the time of her father's death a strong, healthy woman, capable of earning more than the value of what she received from her father and well able to maintain herself by her own work; her father's earnings were not the sole source to which she could have looked for maintenance either at the time of his death or during the period for which she kept his house.

By his award the county court judge assessed the amount of compensation to which she was entitled at 30*l*. The applicant appealed.

Greer, K.C., and *J. G. Hurst*, for the appellant. The only question is whether in point of fact the appellant was at the time of her father's death totally dependent on his earnings: *Moyes* v. *William Dixon, Ld.* (1); *Marsh* v. *Boden.* (2) The county court judge was wrong in taking into consideration the appellant's capacity to earn her own living: *Howells* v. *Vivian & Sons* (3); *Wainwright* v. *Crichton.* (4) Whether there is dependency is entirely a question of fact in each case: *Main Colliery Co.* v. *Davies* (5); *New Monckton Collieries* v. *Keeling.* (6) The appellant's ability to be independent cannot be considered.

A. Neilson, for the respondents. It is admitted that there is partial dependency, and the county court judge has by his award determined the extent of it. It is only a question of quantum, and this Court will not interfere.

[LORD COZENS-HARDY M.R. The county court judge has laid down the principle that it is not sufficient to say that the applicant was keeping her father's house and doing nothing else. It is quite irrelevant to inquire whether she could have supported herself.]

(1) 42 S. L. R. 319.
(2) (1905) 7 W. C. C. 110.
(3) (1901) 18 Times L. R. 36.
(4) (1904) 117 L. T. Journ. 2.
(5) [1900] A. C. 358.
(6) [1911] A. C. 648.

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Hall v. *Tamworth Colliery Co.* (1) Various matters may be considered as to quantum.

[BANKES L.J. If there is total dependency no question of quantum arises. Is the arbitrator entitled to consider whether the applicant need have been dependent on her father ?]

The submission is in the negative.

No reply was called for.

LORD COZENS-HARDY M.R. This raises a question said to be novel, and which is certainly important. [The Master of the Rolls stated the facts and continued :]

The learned county court judge in giving his award said : "I have seen this young woman ; she is a strong, healthy woman, and I have not the least doubt that she was quite competent to have earned money and supported herself." If she had done such an unfilial and improper act as to leave her own father and to compel him to procure a housekeeper to keep the house together, then she would not have been dependent at all, or even partly dependent. The question is, was she really dependent ? The Act contemplates dependency at the time of the death. It is quite clear that if the dependency is total, then the arbitrator has no discretion as to the amount, which is either three years' earnings or 150*l.* If it is partial, the amount of compensation is at large. He must take all the circumstances into consideration, and then he is not tied down, except that he cannot give more than a certain sum. He is not bound to give a particular sum. But in this case, in considering whether the applicant was dependent on her father, he says he must determine whether she was physically competent to earn wages. Plainly that is not so. She left her situation to take care of her mother and afterwards of her father, and to keep the household together. It seems to me that the learned county court judge had no right to consider anything else but this : Was the daughter in fact wholly dependent on the father's earnings ? Had she any other source of income ? The answer can only be that she had not. The learned county court judge has to put to himself the question which was put by Lord Ardwall in *Moyes* v. *William Dixon, Ld.* (2) when he said : "I consider it quite irrelevant to inquire whether she could

(1) (1910) 4 B. W. C. C. 107. (2) 42 S. L. R. 319, 321.

have supported herself. If instead of doing what it was, I think, her duty to do in the circumstances—staying at home and keeping house for her father—she had gone outside and earned money by her labour and compelled her father to get a strange woman for his housekeeper, she might have laid by some savings out of her earnings to provide for the future, but I think it would be establishing a very hard precedent, and a precedent that might work very badly in practice, to say that a daughter who acts as the appellant did here shall not only lose the opportunity of saving money but shall have no claim under this Act in respect of her father's death." That seems to be quite applicable to the present case. With all respect to the learned county court judge, I think he went wrong and as a matter of law misdirected himself, and that the appeal must be allowed.

BANKES L.J. This is an important point, and as we differ from the county court judge I desire to say quite shortly why I come to the conclusion that the appeal should be allowed. There is really no dispute about the facts, and it was not in dispute that if dependency within the meaning of the statute meant a dependency for her entire maintenance and subsistence at the time of her father's death upon her father's earnings, the applicant was wholly dependent upon those earnings. But the learned county court judge seems to have thought it was competent for him, in considering the distinction drawn by the Act between total and partial dependency, to consider the physical capacity of the applicant to earn her own living. If it were open to the county court judge to take that view, we could not interfere with his decision, whether we agreed with the reasonableness of the conclusion he came to on the facts or not; but in my opinion it was not open to the learned judge to take those matters into consideration at all. I desire to guard myself against laying down any rule which would apply to a case where the applicant has been guilty of anything which might be called misconduct in rendering himself or herself dependent on the earnings of the deceased workman. Nothing of the kind occurs here. It seems plain that this applicant, in accordance with what persons in that class of life ordinarily regard as their duty, upon the death of her mother gave up her situation and went and looked after her father. She looked

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after her father for many years, and though healthy and strong and physically capable of earning her living, if she had not been entirely occupied in looking after her father, she was in fact wholly dependent on his earnings during all those years and down to the time of his death. Under the circumstances it seems to me that the physical capacity or incapacity of the applicant is wholly immaterial, and that it is not permissible, for the purpose of taking the applicant out of the class of a person who is wholly dependent, when she would be entitled to the statutory amount of compensation, and placing her in the class of a partial dependant, in which case the amount of compensation would be in the discretion of the learned county court judge, to take into consideration that she could have earned her own living had she not elected to devote herself to looking after her father. In my opinion the learned judge put a wrong construction upon the statute and took matters into consideration which it was not permissible for him to take into consideration, and for those reasons I think the appeal succeeds.

WARRINGTON L.J. I am of the same opinion. The workman in the present case, who was killed by an accident on February 9, 1916, was at the time of his death a widower. He had had several children, but we are concerned only with one, a daughter named Mary. She claims to have been wholly dependent on her father's earnings at the time of his death. Some nine years before his death, when she was eighteen years of age, she was in service, earning 3*s.* 6*d.* a week with board and lodging. At that time her stepmother, her father's second wife, fell seriously ill. She threw up her situation in order to go and nurse her stepmother. That continued for about a year, when the woman died, and from that time this daughter kept house for her father and did the work of the house and acted generally as his housekeeper. She received from her father her board, lodging, and clothing, and small sums for pocket money, but she received no wages, nor did she earn wages outside.

The question which the county court judge had to determine was whether this woman was wholly dependent on her father's earnings at the time of his death. In one sense it is plain she was wholly dependent on his earnings, as she was earning nothing else and had no other source of income ; but the learned county court judge has

thought that he was at liberty to take into account her physical capacity, and, finding that she was strong and healthy, he has asked himself whether, although she did not in fact earn any wages, she could have done so or otherwise have secured her own maintenance independently of her father's earnings. In my opinion, in asking himself that question, whether she could have earned her own maintenance, the county court judge was asking himself a wrong question. I think the only question he had to ask himself in this case was whether she was in fact wholly dependent on her father's earnings. That she plainly was. I think the decision of the learned county court judge was wrong in law, and the matter must go back to him for him to make an award on the footing that she was wholly dependent.

Like Bankes L.J., I desire to guard myself against being supposed to have decided the very special question alluded to by Lord Ardwall in *Moyes* v. *William Dixon, Ld.* (1)

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for R. A. Willock, Taylor & Co., Wolverhampton.*

Solicitors for respondents: *Ford & Ford, for F. E. Metcalf, Bristol.*

(1) 42 S. L. R. 319.

G. A. S.

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May 10, 11, 22.

GLOUCESTER UNION, APPELLANTS *v.* WOOLWICH UNION, RESPONDENTS.

Poor Law—Settlement—Alteration of Parishes—Gloucester Extension Order, 1900, *art. xxxi.—Local Government Board's Provisional Orders Confirmation (No. 14) Act*, 1900 (63 & 64 *Vict. c. clxxxiii.*).

By a Provisional Order, duly confirmed by statute, part of the parish of Upton St. Leonard's was added to the parish of Gloucester. Art. xxxi. of the Order provided, inter alia, that "for all purposes of settlement and removal residence prior to the commencement of this Order in any area added by this Order to the parish of Gloucester . . . . shall be deemed to have been residence in the parish" of Gloucester:—

Held, that this provision applied only to those persons who at the commencement of the Order were in course of acquiring a settlement, so as to preserve their inchoate rights, and that it did not have the retrospective effect of creating or conferring a settlement where none existed at the commencement of the Order.

A person during the years 1893-97 resided in the parish of Gloucester and in that part of the parish of Upton St. Leonard's which by the Order was added to the parish of Gloucester for consecutive periods of less than three years in each of those parishes but together constituting an aggregate period of consecutive residence of more than three years. Prior to the date of the Order he had not acquired a settlement in Gloucester:—

Held, that art. xxxi. had not the effect of conferring upon him a settlement in Gloucester.

CASE stated for the opinion of the Court pursuant to s. 11 of the Quarter Sessions Act, 1849.

On July 7, 1916, an order was made at the instance of the respondents, the Woolwich Union, by a metropolitan police magistrate, adjudging that the parish of Gloucester, in the Gloucester Union, was the place of the last legal settlement of one Thomas Richins, a pauper lunatic, and ordering the appellants, the Gloucester Union, to make certain payments in respect of his maintenance. The appellants gave notice of appeal to quarter sessions, whereupon the parties agreed to state the following special case for the opinion of the Court:—

1. The pauper was born on March 2, 1880, in the parish of Sheepscombe, in the Stroud Union, in the county of Gloucester, and he resided in that parish with his parents till 1893.

2. Thereafter till 1897 the pauper resided with his parents at Nelson Street, in the parish of Gloucester, and at Chequer's Row, in the parish of Upton St. Leonard's (both such parishes being comprised within the appellants' union), for consecutive periods of less than three years in each such parish, but together constituting an aggregate period of consecutive residence of more than three years.

3. At the end of 1897 the pauper enlisted in the Army, and thereafter ceased to reside within the appellants' union.

4. Prior to November 9, 1900, the pauper had not acquired a settlement in any parish or place in the appellants' union, nor was he on November 9, 1900, residing in the appellants' union or irremovable therefrom by virtue of the before-mentioned residence or otherwise.

5. By the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900 (63 & 64 Vict. c. clxxxiii.), confirming, inter alia, the Gloucester Extension Order, 1900, that part of the parish of Upton St. Leonard's comprising the former place of residence of the pauper at Chequer's Row was amalgamated with the parish of Gloucester as from November 9, 1900.

6. Art. xxxi. of the Gloucester Extension Order, 1900, provided as follows :—

"(1.) Every person who has acquired or who on or before the commencement of this Order shall acquire a settlement in any existing parish or hamlet affected by this Order shall be deemed to have acquired a settlement in the parish or hamlet comprising the area in which the acts or circumstances conferring such settlement shall have been done or occurred or if such acts or circumstances shall have been done or occurred in more than one parish or hamlet such settlement shall be in the parish or hamlet comprising the place of residence of such person at the time of acquiring such settlement.

"(2.) Any person who shall have acquired a status of irremovability from any existing parish or hamlet affected by this Order shall be deemed to have acquired a status of irremovability from the parish or hamlet comprising the area in which he shall reside at the commencement of this Order or (if he shall then be in receipt of relief) from the parish or hamlet comprising the area in which he was residing at the time of becoming chargeable.

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"(3.) For all purposes of settlement and removal residence prior to the commencement of this Order in any area added by this Order to the parish of Gloucester the parish of Quedgley or the parish of Whaddon as the case may be shall be deemed to have been residence in the parish to which the area is added."

The respondents contended, and the appellants denied, that the legal effect of paragraph 3 of art. xxxi. was to confer upon the pauper a settlement in the parish of Gloucester.

The question for the opinion of the Court was whether the pauper became legally settled in the parish of Gloucester by virtue of his said residence and par. 3 of art. xxxi.

Disturnal, *K.C.*, and *Herbert Davey*, for the appellants. The question turns upon the true construction of art. xxxi. of the Gloucester Extension Order, 1900, which is in the form now usual in Orders effecting an alteration of boundaries. Par. 3 of that article, upon which the question mainly turns, does not affect settlements acquired outside Gloucester Union; it merely deals with the case of persons who at the date of the Order were in process of acquiring a settlement in any of the areas affected by the Order. Thus, if a person had resided for less than three years in that part of Upton St. Leonard's parish which was added to Gloucester parish the effect of par. 3 is to enable that period of residence to be added to the period of residence in the parish of Gloucester subsequent to the Order to make up the three years necessary for the acquisition of a settlement by residence. Apart from par. 3 residence short of three years in that part of Upton St. Leonard's parish added to Gloucester prior to the commencement of the Order could not have been taken into account. The paragraph has only a prospective operation, and was not intended to confer a settlement upon a person in a place in which he once resided for three years but which he has long since left. If the respondents' contention is sound a settlement recently acquired in some other parish would have to give way to a merely notional settlement acquired in Gloucester founded on residence in the added area many years previously. Such an absurd result cannot possibly have been contemplated by those who framed the Order. [They cited *Reg.* v. *Ipswich Union.* (1)]

(1) (1877) 2 Q. B. D. 269.

Rawlinson, K.C., and *Rentoul*, for the respondents. The pauper having resided for more than three years continuously (1893-97) in what is now the new parish of Gloucester has acquired a settlement there by virtue of par. 3 of art. xxxi. His case comes within the precise terms of the paragraph. The appellants' contention involves reading the paragraph as if it said "For all purposes of settlement and removal *immediately* prior to the commencement of this Order," &c., but there is no ground for departing from the plain language used.

Disturnal, K.C., in reply. In order to give a consistent construction to all three paragraphs of art. xxxi., par. 3 must be read as dealing only with the circumstances existing at the date of the Order.

[AVORY J. referred to *Calne Union* v. *St. Mary, Islington, Guardians*. (1)]

In that case there was no clause in the Order corresponding to par. 3 of the present Order, and Channell J. pointed out that provision had not been made to meet the case of persons who were in process of acquiring a settlement at the date of the Order. It may well be that it was in consequence of that decision that par. 3 has now been added in this and similar Orders.

Cur. adv. vult.

May 22. The following judgment of the COURT (Viscount Reading C.J., Ridley and Avory JJ.) was read by

AVORY J. The pauper Thomas Richins from 1893 to 1897 resided in the parishes of Gloucester and Upton St. Leonard's as they were then constituted, but not for a consecutive period of three years in either, with the result that under the law then applicable he did not acquire a legal settlement in either of the said parishes. An order has now been made adjudging that the parish of Gloucester was the place of the last legal settlement of the pauper, and the respondents contend that this order was valid on the ground that the legal effect of par. 3 of art. xxxi. of the Gloucester (Extension) Order, 1900, confirmed by the Local Government Board's Provisional Orders Confirmation

(1) (1900) 69 L. J. (Q.B.) 400.

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(No. 14) Act, 1900, was to confer upon the said Thomas Richins a settlement in the parish of Gloucester.

By the provisions of this Gloucester (Extension) Order, which for the purposes of any question arising in this case came into force on November 9, 1900, a portion of the area of the parish of Upton St. Leonard's comprising the former place of residence of the said Thomas Richins was separated from it and added to and amalgamated with the parish of Gloucester: see arts. iii. and xxv.

Before considering the legal effect of art. xxxi. of this Order it is necessary, we think, to bear in mind that by the common law, upon such a division of the parish of Upton St. Leonard's, any settlement already acquired in that parish would have been lost: see *Reg.* v. *Tipton Inhabitants* (1); *Dorking Union* v. *St. Saviour's Union*. (2) The purpose and effect of par. 1 of art. xxxi. is to get rid of this difficulty and preserve the settlements that have been already acquired before the commencement of the Order. The purpose and effect of par. 2 is in like manner to preserve a status of irremovability that has been acquired at that date; and the question raised in this case is whether par. 3 of the article is to be construed in all its generality as applicable to acts or circumstances which have been done or occurred completely in the past and before the commencement of the Order, so as to create or confer a settlement where none existed before, or whether, as the appellants contend, it is to be construed as supplemental to pars. 1 and 2 and limited to the cases where persons are in process of acquiring a settlement or status of irremovability so as to preserve their inchoate rights. If the words in par. 3 are construed without limitation, then, the residence of the pauper at Chequer's Row in Upton St. Leonard's between 1893 and 1897 being deemed to be residence in Gloucester, a settlement in Gloucester is conferred upon him and the respondents succeed. We think this paragraph should be so construed subject to the general principle that a statute is prima facie prospective and does not interfere with existing rights unless it contains clear words to that effect, or unless, having regard to its object, it necessarily does so, and that a statute is not to be construed to have a greater retrospective operation than its language renders necessary—see

(1) (1842) 3 Q. B. 215. (2) [1898] 1 Q. B. 594.

per Lindley L.J. in *Lauri* v. *Renad* (1)—whatever view may be entertained of the probable intention of the Legislature, unless some manifest absurdity or inconsistency results from such construction; but we have come to the conclusion that the construction of the paragraph contended for by the respondents produces such a practical inconsistency with par. 1 of the same article that it is necessary to put some limitation upon it. If a person had resided before the commencement of the Order for two years in that portion of the parish of Upton St. Leonard's which has been added to Gloucester and for one year following in the portion which remains the parish of Upton St. Leonard's, he would by the latter part of par. 1 be deemed to have acquired a settlement in the parish of Upton St. Leonard's, but if par. 3 is to be applied to such a case his residence in the added portion of Upton St. Leonard's is to be deemed to have been residence in the parish of Gloucester; and if so deemed, then he has not had three years' consecutive residence in any one parish and has no settlement—in other words, the effect of par. 3 in such a case is to destroy the settlement which is preserved by par. 1 and to restore the common law rule which is intended to be abolished. The same result would follow in the converse case where the later period of residence completing the three years in the old parish of Upton St. Leonard's is in the area which has been added to the parish of Gloucester.

The decision of the Court in *Calne Union* v. *St. Mary, Islington, Guardians* (2), where the Order dividing a parish contained no clause similar to par. 3 of art. xxxi., established that a period of residence before the commencement of the Order could not be added to a subsequent period of residence in what would have been the same parish but for the Order for the purpose of a settlement. This decision was in January, 1900; the Order in question was made by the Local Government Board in May, 1900, and in our opinion par. 3 of art. xxxi. was intended to remedy this defect and to apply only to those persons who were, at the commencement of the Order, in course of acquiring a settlement so as to preserve their inchoate rights, and that it has not the retrospective effect contended for by the respondents of creating or conferring a settlement where none existed at the commencement of the Order. The words "For all

(1) [1892] 3 Ch. 402, 421. (2) 69 L. J. (Q.B.) 400.

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purposes" should, we think, be construed "For all purposes of future settlement and removal," and no conflict then arises with par. 1 of the same article.

The result is that the pauper was not, in our opinion, legally settled in the parish of Gloucester and the order of adjudication should be quashed.

Appeal allowed.

Solicitors for appellants: *Vizard, Oldham, Crowder & Cash, for H. Allen Armitage, Gloucester.*

Solicitor for respondents: *E. W. Sampson, Woolwich.*

J. S. H.

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May 7, 11.

B. AERODROME, LIMITED, APPELLANTS *v.* DELL, RESPONDENT.

Rating—"Houses"—Aeroplane Hangar—X. Sea Defence Order, 1913, *art.* 18.

By a Provisional Order, confirmed by Act of Parliament, commissioners were appointed to execute works for preventing inroads of the sea, and they were authorized to levy on the owners of certain properties a rate for defraying the expenses of carrying out the works. By art. 18 of the Order the amount of the rate in the case of "houses, shops and farm buildings" was not to exceed 3*s.* 4*d.* in the pound, whereas the rate on land was not to exceed 10*s.* in the pound.

The appellants were the owners of aeroplane hangars situated within the rateable area. The hangars were permanent structures for housing aeroplanes and could be used for the construction and repair of aeroplanes. They contained no lavatories or sleeping accommodation:—

Held, that the hangars were "houses" within the meaning of art. 18 of the Provisional Order.

CASE stated by justices of the peace for a seaboard county.

By the X. Sea Defence Order, 1913, confirmed by a Provisional Order Confirmation Act, commissioners were constituted for the purpose of the construction, repair, and maintenance of defences against encroachment by the sea in the district to which the Order applied. Art. 18 of the Order was as follows:

"(1.) For the purpose of defraying any expenses incurred by them in the execution of their powers and the performance of their

duties under this Order the commissioners shall from time to time as occasion may require make by writing under their common seal and levy a rate or rates . . . .

" (2.) The said rate or rates shall be made and levied on the owners of property and shall be assessed on the rateable value of the property ascertained by the valuation list for the time being in force : Provided that—(*a*) No such rate or rates levied for any one year in respect of any property (other than . . . . so much of the lands coloured blue " on certain maps " as shall not for the time being consist of houses shops or farm buildings with the yards outbuildings and gardens (not being market gardens) appurtenant thereto) shall exceed an amount equivalent to 3*s*. 4*d*. in the pound calculated on such rateable value ; (*b*) no such rate or rates levied for any one year in respect of . . . . so much of the lands coloured blue on the said maps as shall not for the time being consist of houses shops or farm buildings with the yards outbuildings and gardens (not being market gardens) appurtenant thereto shall exceed an amount equivalent to 10*s*. in the pound calculated as aforesaid."

By art. 1 the expression " owner " had the same meaning as in the Public Health Act, 1875.

At the proper Court of summary jurisdiction a complaint was preferred by Dell, the respondent, against the B. Aerodrome, Limited, the appellants, for 12*l*., the first instalment of an unpaid defence rate, made on November 18, 1914, amounting to 24*l*., assessed on property described as " hangars, &c.," belonging to the appellants. Upon the hearing of the complaint the making of the rate and the non-payment of the instalment by the appellants was proved.

The hangars were situated on lands coloured blue on the maps referred to in art. 18 of the Order. The rate claimed was an amount equivalent to 10*s*. in the pound calculated on the rateable value.

It was contended on behalf of the appellants that the hangars came within the words " houses shops . . . . with the outbuildings appurtenant thereto " in par. 2 of art. 18 of the Order, and that the rate should therefore have been calculated at 3*s*. 4*d*. in the pound, and not at 10*s*.

The justices were of opinion that this contention on the part of the appellants was not for them to decide, but should have been raised on an appeal against the rate to quarter sessions, and,

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B. AERODROME, LIMITED v. DELL.

inasmuch as there had been no appeal, the justices made an order for the payment of the instalment of the rate.

The facts with regard to the construction and user of the hangars had not been stated in the case, or found by the justices, and the following statement of facts had been agreed upon by the parties for the purpose of the hearing in the Divisional Court :—

"The hangars mentioned in the rate-book of the X. Sea Defence Commissioners are buildings erected on the appellants' aerodrome at . . . . which the appellants could have let to tenants. They are built of corrugated iron on a wooden framework and are of a size large enough to accommodate either one, or more than one, aeroplane. Each has a mechanic's bench with windows over it in the back wall. Some may have a wooden floor, some have a concrete floor, some may have no floor at all, according to the fancy of the builder or the tenant. In height they would be just sufficient to house an aeroplane without risk of contact with the roof and rafters. The walls of the buildings consist of corrugated iron, which forms an outer casing to the wooden framework, each of the uprights of this framework being let into a square of concrete sunk into the ground to a depth of some three or four feet. Large sliding doors made of wood and reaching almost to the roof form the front walls of, and the main entrances into, the hangars. There is usually a wicket door in one of these large sliding doors. Tenants of a hangar would generally use it for one or more of the following purposes :—(1.) For the housing of aeroplanes; (2.) if provided with the necessary workshops and tools, for repairing aeroplanes and for the construction of new ones which could be intended either for use in the aerodrome or for sale or hire if desired, but not necessarily for sale or hire; or (3.) for teaching the public to fly. In the early days of the aerodrome one of the buildings erected there was fitted out as and used as a restaurant and contained ladies' and gentlemen's lavatories and dressing-rooms. In most cases there would be an office built of wood and corrugated iron annexed to the hangar and communicating therewith by means of a doorway, in which office the tenant would attend to his correspondence and carry on his business generally. The tenant of a hangar bordering on an aerodrome might also have the right to use the open space round the hangar for rising from the ground by means of an aero-

plane and for landing after a flight and returning to the hangar. There need be nothing whatever within the walls and roof of the building apart from the iron girders and the wooden rafters save that there might possibly be one or two iron supports for the girders let into the floor space or ground within the building. In most of the hangars there are windows let into the walls at the back situate over and above the mechanics' benches, which are placed along and within such walls. Save as aforesaid there is no lavatory or sleeping accommodation in the ordinary way. Apart altogether from the hangars there was in the grounds of the aerodrome a block of buildings smaller than hangars which were used as the general offices and registered address of the company and having a telephone."

In the course of the hearing in the Divisional Court the parties agreed that the Court should decide the one question, namely, whether the amount of the rate to be levied on the hangars should, under art. 18 of the Order, be calculated at 10*s.* or at 3*s.* 4*d.* in the pound.

Ryde, K.C., and *L. Mossop*, for the appellants. The hangars are houses within the meaning of art. 18 of the Provisional Order. The word "house" is an ambiguous word with no definite legal meaning: *Grant* v. *Langston*, per Lord Halsbury (1); and, therefore, in order to ascertain the meaning in which it is used in any particular enactment one must look at the context and consider the purpose of the enactment. It is obvious that the reason for making buildings pay a lower rate than land is that the capital value of a building is much higher than that of the land on which it stands. The provisions of art. 18 were intended to redress the inequality which would otherwise exist, and there is therefore a very good reason why the word "houses" in art. 18 should not be limited to dwelling-houses, but should be held to include all permanent structures, not being shops or farm buildings, intended to be used for the ordinary purposes of the daily work and life of man in the particular locality.

Compston, K.C., and *Horton-Smith* (*J. Flowers* with them), for the respondent. From the time of the decision of *Surman* v.

(1) [1900] A. C. 383, 391.

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Darley (1) down to *Lewin* v. *End* (2) in the House of Lords the word "house" has always been construed to mean prima facie a building used, or capable of being used, as a dwelling-house. There is no reason for giving it any other than that meaning in art. 18. The fact that "houses" are contrasted with "shops" and "farm buildings," which would be covered by the word "houses" if the suggested wider meaning be given to that word, is strong ground for saying that the word is used in art. 18 in its ordinary and natural meaning of dwelling-house. No one could contend that these hangars are houses in the ordinary sense of the word. The Legislature having authorized the rating of three specified classes of buildings in a particular manner, it is not for this Court to speculate why language was used which does not include these hangars. [*Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (3) was also cited.]

Ryde, K.C., replied.

VISCOUNT READING C.J. In this case the respondent preferred a complaint against the appellants for non-payment of the first instalment of a rate assessed on certain hangars, of which the appellants are the owners, the amount of the rate being calculated at 10*s.* in the pound on the rateable value. The justices held that the defence which the appellants desired to raise could not be entertained by them, though it might be a ground of appeal against the rate, and they therefore made an order for the payment of the rate by the appellants. The question for the opinion of this Court as stated in the case was whether the justices were right in holding that they had no jurisdiction to adjudicate upon the defence raised by the appellants, but it has become unnecessary for us to decide that question, because the parties have asked the Court to decide the point raised by the appellants, irrespectively of the decision of the justices, although the result will be to deprive the parties of the right of appeal against our decision.

The question, therefore, which we have to decide is whether the rate levied on these hangars should be a 10*s.* or a 3*s.* 4*d.* rate, and that depends on whether the hangars come within the words

(1) (1845) 14 M. & W. 181. (2) [1906] A. C. 299.
(3) (1876) 1 Ex. D. 469.

"houses shops or farm buildings with the yards outbuildings and gardens (not being market gardens) appurtenant thereto" in art. 18 of the relevant Sea Defence Order, 1913. [The Lord Chief Justice stated the facts as set out in the agreed statement, and continued:] In dealing with this question the difficulty that meets one at the outset is that no special meaning is given to the word "houses" in this Order, and we are certainly not entitled to say that the word necessarily means a dwelling-house only. The Order does not say "dwelling-houses," but "houses," and it was pointed out by Lord Halsbury in *Grant* v. *Langston* (1) that "the word 'house' is an ambiguous word." In that case the House of Lords was dealing with the inhabited house duty, and the question was as to the meaning of the word "house" in s. 13, sub-s. 2, of the Customs and Inland Revenue Act, 1878, and the House of Lords thought that the particular statute in question must be looked at in order to ascertain in what connection and with what meaning the word had been used. If the true view is that the word "house" means a dwelling-house, and nothing more, the reasoning of Lord Halsbury in *Grant* v. *Langston* (1) was entirely out of place, but it was because the word is an ambiguous one that he went on to say that the decision of Jessel M.R. in *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (2) "shews that you must search otherwise than in the word itself what is the meaning in which the Legislature has used it, since the natural and ordinary meaning of an ambiguous word cannot be ascertained without the context," and after giving instances of different meanings of the words he says: "Accordingly, the word 'house' has no common or ordinary meaning so fixed and definite that by the mere use of the word you can determine in what sense the Legislature has used it." It is to be observed that Lord Halsbury was not speaking merely with reference to the particular statute then under consideration; he stated a general proposition; and every word of the above passage is applicable to the present case.

Therefore, in my view, we must start our consideration of this case by assuming that the word "house" has no fixed or definite meaning, and we must look at the Provisional Order to see in what sense the word has been used. If once that proposition is kept in

(1) [1900] A. C. 391. (2) 1 Ex. D. 469.

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Viscount Reading C.J

mind, some of the difficulties to which this case gives rise will disappear. Looking at the objects of this Provisional Order, I have come to the conclusion that the word "houses" in art. 18 is not intended to be confined to dwelling-houses, but is intended to cover any such permanent structures as can be properly described in ordinary language by the term "house." The structure must be permanent; a mere temporary erection is not a house. When once it has been shown that these hangars are permanent structures and are used, or are capable of use, for work by man it is possible to come to the conclusion that they are capable in law of being houses within the meaning of art. 18. The question whether on the admitted facts the hangars are houses is a very difficult question of fact. I think that the more extended meaning must be given to the word "houses" in this Order, not only for the reasons given by Lord Halsbury in *Grant* v. *Langston* (1), but because there is nothing in the context to prevent it. It is said, however, that if that were so, there was no necessity for having the words "shops" and "outbuildings" also. I do not attach much weight to that argument. It is quite possible to imagine a shop which is in no sense a house or even a permanent structure. In my view the language of par. 2 of art. 18 was intended to include every possible kind of permanent structure which might be erected on the land. If one considers the object of this Order, which we are entitled to do in order to ascertain the meaning of the ambiguous word "houses," one sees a reason why the more extended meaning should be given to the word. The object of the Order was to protect the land from inroads of the sea. For effecting that object it was necessary to raise money by rates, and we find a distinction drawn in the Order between different portions of the lands affected. On certain portions, coloured green and brown on the map, there were at the time of the making of the Order numerous houses and other buildings. In respect of those portions of the land the rate was not to exceed 3*s.* 4*d.* The land coloured blue was entirely agricultural land without any buildings on it, and therefore a higher rate, not exceeding 10*s.* was imposed. But if it should happen that buildings were erected on the land coloured blue it is obvious that the capital value of the buildings would exceed the value of the surface of the land on which

(1) [1900] A. C. 391.

they stood, and therefore any buildings which may be erected on the land coloured blue are only to pay at the rate of 3*s.* 4*d.*, which it was considered would provide a sum of money at least commensurate to a 10*s.* rate on the land. These considerations appear to me to show that in construing the word "houses" it is reasonable not to confine it to dwelling-houses, but to give it the more extended meaning of permanent structures such as I have described, and no answer has been given to the argument as to reasonableness. But when once it is admitted, as it must be, that "house" is an ambiguous word, we are not only entitled, but are bound, to have regard to the reasonableness of the one view as compared with the unreasonableness of the other, and it cannot be denied that the most extraordinarily capricious results would follow from giving to the word "houses" in this Order the limited meaning of dwelling-house.

On the whole, therefore, although the question is one of difficulty, I think that the better view is that these hangars, which may without inaccuracy be described as houses for aeroplanes, are houses within the meaning of art. 18, and, that being so, the lower rate is applicable to them.

For these reasons I am of opinion that this appeal ought to be allowed with costs.

RIDLEY J. I agree and have very little to add. Since the decision of *Grant* v. *Langston* (1) by the House of Lords there can be no doubt (even if there had been previously any room for doubt) that the word "house" is an ambiguous word. It may be used in the narrow sense of a dwelling-house, as was the case in *Surman* v. *Darley* (2), or on the other hand it may have any one of a number of different meanings, some of which were mentioned by Lord Halsbury in *Grant* v. *Langston*. (3) Therefore, when a Court has to construe the word in some particular Act of Parliament, it is legitimate to consider the context in which the word is used and also the object of the Act, in order to arrive at a right conclusion as to its meaning in that Act. In *Surman* v. *Darley* (2) the language of the Act in question and its object (the making of a rate for the support of the

(1) [1900] A. C. 383. (2) 14 M. & W. 181.
(3) [1900] A. C. 391.

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B. AERODROME, LIMITED v. DELL.

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rector of a parish) afforded strong ground for holding that the word "house" in that Act was used simply in the sense of dwelling-house, but it is, I think, misleading to say that "house" prima facie means dwelling-house. As Lord Halsbury said in *Grant* v. *Langston* (1) "the word 'house' has no common or ordinary meaning so fixed and definite that by the mere use of the word you can determine in what sense the Legislature has used it."

We have therefore to perform the difficult task of determining in what sense the word is used in this Provisional Order. I do not think that the other words in the context, "shops farm buildings and outbuildings," afford much assistance, and I cannot agree with the argument that the use of those words shows conclusively that the houses referred to must be limited to dwelling-houses. But, if one considers the object of the Order, is there any reason to limit them in that way? In the course of the argument I asked Mr. Compston if he could give any reason why a distinction should be drawn in this Order between dwelling-houses and other buildings, not being shops or farm buildings, rather than between all buildings on the one hand and land on the other, and he failed to do so. But there is, as my Lord has pointed out, a very good reason why in this Order buildings should for rating purposes be treated differently from land.

LUSH J. I have felt very great doubt in this case. The appellants had to overcome two difficulties: First, they had to satisfy us that the word "houses" in art. 18 is reasonably capable in law of including buildings of the character of these hangars. The second difficulty—and it was one which impressed me more than my Lord and Ridley J.—was whether, if the word "house" may in certain cases have an extended meaning, the context was not in this case so strong as to indicate that in this particular Order the word is incapable of bearing that extended meaning. The word has no fixed meaning. The same building may be a house within the meaning of the word in one Act and not a house within another Act, but I think that in *Lewin* v. *End* (2) the House of Lords did indicate that the general use of the term is such as would only include buildings used, or capable of being used, for human

(1) [1900] A. C. 391. (2) [1906] A. C. 299.

habitation. It is clear also, I think, that however wide an interpretation is given to the word there must be some restriction on its meaning, and if it were necessary for the purpose of deciding this case to hold that the word "house" includes any permanent building, no matter how it is constructed or for what purpose it is used, I should not be prepared to agree with that result. But in my opinion it is not necessary in this case to decide that every permanent building is a house. These hangars are used as places at which the tenants of them carry on their business and where work is constantly, though not daily, done. I think that it is possible to say that the word "houses" in this Provisional Order was intended to, and does, include buildings in which people carry on their daily business, and that we are justified in holding that the word is capable of being given the extended meaning contended for by the appellants.

As to the second of the difficulties which I have mentioned, I feel that there is great force in the argument that the enumeration of other structures, shops, farm buildings, and outbuildings, indicates that the word "houses" was used in the limited sense of buildings used, or capable of being used, for human habitation. But if one were to adopt that contention one would be faced with this further difficulty—there would be this very curious result, that in the case of two buildings, one used for human habitation and the other for working on and for storing aeroplanes, the former would only pay a 3*s.* 4*d.* rate, whereas the latter would pay 10*s.*, although in both cases there was the same increase in the rateable value as compared with the rateable value of land.

On the whole I think that we are justified in giving to the word "houses" in this Order as extended a meaning as it is reasonably capable of bearing, and I am prepared to hold that the word is wide enough to include these hangars.

Appeal allowed.

Solicitors for appellants: *Wingfield, Blew & Kenward.*
Solicitors for respondent: *J. E. Dell & Lodder, Brighton.*

F. O. R.

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April 24, 25.

THE KING *v.* SANDERS.

Mines—High Peak Mining Customs—Small Barmote Court—Jurisdiction —"Miner"—High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 *Vict. c.* 94), *Sched. I., art.* 16.

Although a person who mines for a mineral other than lead ore is not ipso facto a "miner" within the meaning of Sched. I., art. 16, of the High Peak Mining Customs and Mineral Courts Act, 1851, if in the course of working such a mineral he in fact takes lead ore he thereby becomes a miner, none the less because he did not start his mining operations with the intention of taking it.

RULE for a certiorari to remove into the High Court the proceedings in an action in the High Peak Small Barmote Court.

In 1851 the High Peak Mining Customs and Mineral Courts Act was passed for the purpose of establishing and amending the ancient mineral customs of a district known as the King's Field in the hundred of High Peak, and of defining the jurisdiction of the ancient mineral Courts of that district known as the Great and Small Barmote Courts. The customs established by the Act are set out in Sched. I. thereto, by art. 1 of which "It is lawful for all the subjects of this realm to search for, sink, and dig mines or veins of lead ore upon, in, or under all manner of lands of whose inheritance soever they may be" (certain specified classes of land being excepted). If no vein be found and the person making search discontinues it for fourteen days he must level and make good the ground for the benefit of the landowner; but if a new vein be found the finder is entitled (art. 10) to have a certain portion of the vein set out to him by an official called the barmaster. By art. 16, "If any miner shall commit a trespass in the mine or vein of any other person, the person aggrieved may commence an action in the Small Barmote Court." There is no definition of "miner" in the Act, but in s. 2 "the words 'mine or mines, vein or veins' shall mean a mine or mines, vein or veins, of lead ore, and shall include . . . . all minerals containing lead ore."

One Wilson Eyre was the owner under the Act of a vein of lead ore, which vein was situate in the land of a Mr. Needham. The

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applicant, A. W. Heginbotham, was a lessee from Mr. Needham of a right to work a bed of barytes lying on both sides of Eyre's vein. In the course of working the barytes the applicant crossed Eyre's vein and removed some of his lead ore. Eyre thereupon brought an action of trespass in the Small Barmote Court, and the jury found for the plaintiff for 51*l.* 10*s.* damages. The steward of the Court left it to the jury to say whether the applicant was a miner, and they found that he was. The applicant objected that the Barmote Court had no jurisdiction to entertain the action on the ground that he was not a "miner" within the meaning of Sched. I., art. 16, and he obtained a rule nisi for a certiorari, addressed to the steward of the Court, to remove the proceedings into the High Court.

Douglas Hogg showed cause. A miner under the Act is a person who works a vein of lead ore. The jury found that the applicant had worked Eyre's vein of lead ore; therefore he was a miner, and the Court consequently had jurisdiction.

R. Sutton, in support of the rule. To constitute a man a miner under the Act he must be claiming as a member of the public a right to work lead ore under the customs. The applicant did not so claim; he was acting under a lease from the landowner to search for and work barytes, which is a mineral to which the Act and customs do not apply, and the fact that in the course of working that barytes he by mistake took some of the plaintiff's lead ore does not make him a miner. He no doubt committed a trespass, but the remedy for that trespass was by action in the ordinary Courts. If a man is to be a miner at all he must be so before and independently of the trespass.

VISCOUNT READING C.J. The applicant in this case seeks by certiorari to remove into this Court the proceedings in an action in the High Peak Small Barmote Court between Wilson Eyre, plaintiff, and A. W. Heginbotham, defendant, whereby judgment was obtained for the plaintiff. The action was brought under the High Peak Mining Customs and Mineral Courts Act, 1851, which Act, as the preamble recites, was passed for the purpose of confirming and amending the mineral customs of a mining

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district known as the King's Field and of defining the jurisdiction of certain Courts respectively called the Great and Small Barmote Court. By s. 7 of the Act the Small Barmote Court is given jurisdiction to try actions of trespass. In Sched. I. to the Act the mining customs thereby established are set out, and according to those customs it is lawful for all subjects of the realm to search for and dig lead ore in any person's land within the district, and the finder of a vein of lead ore is entitled to have a certain length of the vein allotted to him as his property. Then by art. 16 of that schedule, "if any miner shall commit a trespass in the mine or vein of any other person, the person aggrieved may commence an action in the Small Barmote Court." It was under that article that this action was brought, and the applicant objected that he was not a miner within the meaning of the article and that the Court had no jurisdiction to try it. It must be conceded that the expression miner as used in the Act is limited to a person who is mining lead ore. That is shown by the definition of "mine" in s. 2. The applicant was mining barytes under a lease from the owner of the soil, and the question is whether the fact of his working for barytes under the authority of the landowner, and not for lead ore under the customs of the district, prevents him from being a miner if in the course of working the barytes he in fact takes lead ore away. It was contended for the applicant that it does; that in order to constitute him a miner he must set out with the intention of working under the customs, and that it is not enough that he should remove some lead ore as incidental to the working of another mineral to which the customs do not apply. I do not think that that contention is sound. In my opinion, if a man in the course of mining, whatever he may be mining for, digs and carries away lead ore he is a miner, and it is immaterial that he did not start his mining operations with the intention of taking lead ore. The contention, therefore, that the Barmote Court had no jurisdiction fails, and the rule must be discharged.

RIDLEY J. I am of the same opinion. I agree that under the Act "miner" primarily means a person mining lead ore, and nothing more. But it is another thing to say that "miner" in art. 16 does not include a person seeking for barytes. This defen-

dant was no doubt endeavouring to get barytes, but it was found by the jury that in doing so he interfered with a lead vein. That being so, he cannot be heard to say that he was not mining lead ore because he intended only to get barytes.

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AVORY J. I agree and have nothing to add.

Rule discharged.

Solicitors for applicant: *Moodie & Sons, for Bennett & Co., Chapel-en-le-Frith.*

Solicitors for respondent: *Telfer Leviansky & Co.*

J. F. C.

THE KING *v.* DICKINSON. *Ex parte* GRANDOLINI.

1917
May 4.

Criminal Law—Summary Jurisdiction—Rogue and Vagabond—Soliciting by Male Person—Right to Trial by Jury—Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1—*Criminal Law Amendment Act*, 1912 (2 & 3 *Geo.* 5, *c.* 20), *s.* 7, *sub-s.* 2.

A person charged before a Court of summary jurisdiction as a rogue and vagabond under s. 1 of the Vagrancy Act, 1898, has no right to claim to be tried by a jury under s. 17 of the Summary Jurisdiction Act, 1879, notwithstanding that the term of imprisonment which may be imposed has been increased from three to six months by s. 7, sub-s. 1, of the Criminal Law Amendment Act, 1912.

RULE NISI for a writ of certiorari.

The applicant was charged before a magistrate as a rogue and vagabond, under s. 1 of the Vagrancy Act, 1898 (1), with soliciting,

(1) 61 & 62 Vict. c. 39, s. 1: "(1.) Every male person who—

"(*a*) knowingly lives wholly or in part on the earnings of prostitution; or

"(*b*) in any public place persistently solicits or importunes for immoral purposes,

shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), s. 7: "(2.) The period of imprisonment with hard labour which may be awarded to a person deemed to

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and was summarily convicted and sentenced to be imprisoned for two months with hard labour. He obtained a rule nisi for a certiorari upon the ground that, under s. 17 of the Summary Jurisdiction Act, 1879 (1), he had the right to be tried by a jury and that the magistrate ought to have so informed him before the charge was gone into.

Branson and *G. C. Whiteley* showed cause. The effect of s. 7, sub-s. 2, of the Criminal Law Amendment Act, 1912, but for the proviso, by increasing the term of imprisonment which can be awarded, would be to give the person charged as a rogue and vagabond under s. 1 of the Vagrancy Act, 1898, the right to claim

be a rogue and vagabond under the Vagrancy Act, 1898, ... shall be increased to six months, but such person shall not be liable to be dealt with as an incorrigible rogue within the meaning of the Vagrancy Act, 1824. Save as aforesaid, nothing in this subsection shall affect the powers of a Court of summary jurisdiction to deal with a person deemed to be a rogue and vagabond under the Vagrancy Act, 1898, anything in any other Act to the contrary notwithstanding."

"(5.) A person charged with an offence under the Vagrancy Act, 1898, ... may, instead of being proceeded against in England as a rogue and vagabond, ... be proceeded against on indictment, and on conviction on indictment shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years, and, in the case of a second or subsequent conviction, such second or subsequent conviction being a conviction on indictment, the Court may, in addition to any term of imprisonment awarded, sentence the offender if a male to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence."

(1) 42 & 43 Vict. c. 49, s. 17: "(1.) A person when charged before a Court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the Court and before the charge is gone into but not afterwards, claim to be tried by a jury, and thereupon the Court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence, and, if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly, and the expenses of the prosecution shall be payable as in cases of felony."

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a trial by jury under s. 17 of the Summary Jurisdiction Act, 1879. But the proviso clearly provides that the increase of the term of imprisonment is not to affect otherwise the powers of a Court of summary jurisdiction. Sub-s. 5 of s. 7 makes this quite clear, for it gives the option to choose whether the offender shall be tried summarily or by a jury to the prosecution, and not to the offender. Unless the proviso is held to operate in this way, it can have no operation at all.

Stutfield, for the applicant. The right to a trial by jury given by s. 17 of the Summary Jurisdiction Act, 1879, ought not to be held to be taken away unless it is specifically and expressly so enacted by providing that s. 17 shall not apply. The effect of increasing the maximum punishment to six months is to bring s. 17 into operation, and therefore the proviso by the words "save as aforesaid" preserves that right. That proviso must have been inserted to prevent any question being raised as to an implied repeal of s. 1 of the Act of 1898.

VISCOUNT READING C.J. The applicant was convicted of being a rogue and vagabond by a metropolitan police magistrate and sentenced to imprisonment with hard labour for two months. A rule nisi was then obtained in this Court for a writ of certiorari to bring up the conviction to be quashed on the ground that the magistrate had omitted to give the applicant an opportunity of claiming to be tried by a jury under s. 17 of the Summary Jurisdiction Act, 1879. The question which arises for our decision is as to the meaning to be given to the proviso at the end of s. 7, sub-s. 2, of the Criminal Law Amendment Act, 1912. By s. 1 of the Vagrancy Act, 1898, amending the Vagrancy Act, 1824, it is provided that: [His Lordship read the section.] Under s. 4 of the Vagrancy Act, 1824, a person could be summarily convicted as a rogue and vagabond and sentenced to a term of imprisonment not exceeding three months. By the Criminal Law Amendment Act, 1912, s. 7, sub-s. 2, the term of imprisonment which could be awarded was increased from three to six months. The effect of that alteration, if it stood alone, would be, by virtue of s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879, that such a person being liable on summary conviction to be imprisoned for a term exceeding three months would

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have a right to claim to be tried by a jury. But then follows the proviso to s. 7, sub-s. 2, of the Act of 1912, which gives rise to the question in this case. [His Lordship read the sub-section.] That means that notwithstanding that the powers of a Court of summary jurisdiction are affected to the extent of giving the Court power to sentence to a term of six months, yet the powers of the Court are to remain otherwise unaffected although there might be other statutes affecting the matter. In this case the effect of sub-s. 2 of s. 7 would be to affect the powers of a Court of summary jurisdiction by giving the person charged the right to claim a trial by jury under s. 17 of the Summary Jurisdiction Act, 1879, were it not for the proviso. I cannot read this proviso otherwise than as meaning that all the powers of a Court of summary jurisdiction shall remain unaffected except as expressly altered, that is, to the extent of being able to award a longer term of imprisonment. This rule must therefore be discharged.

RIDLEY J. I agree.

AVORY J. I agree, and only wish to add that, in my opinion, sub-s. 5 of s. 7 of the Criminal Law Amendment Act, 1912, confirms our view and shows that the option of proceeding as for an indictable offence is with the prosecution and not with the person charged.

Rule discharged.

Solicitor for applicant: *F. J. Day.*

Solicitor for the Crown: *Treasury Solicitor.*

J. H. W.

GODDARD *v.* GREIG.

1917
May 15.

London—Building Notice—Alteration and Building—Necessary Repair—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 145, 209.

By s. 209 of the London Building Act, 1894, "Every addition to or alteration of a building and any other work made or done for any purpose in to or upon a building (except that of necessary repair not affecting the construction of any external or party wall)" is to be subject to the provisions of the Act relating to building notices.

A certain house in London had a flat wooden roof covered with zinc. The zinc having become defective, the owner employed a builder to repair it. The builder stripped off the zinc, and substituted for it felt covered with a layer of asphalte. On appeal by the builder against a conviction for failing to serve a building notice in accordance with the provisions of the Act:—

Held, by Viscount Reading C.J. and Ridley J. (on the assumption that the words "except that of necessary repair" in s. 209 formed an exception to the words "alteration of a building" as well as to "any other work,"), that there was evidence on which the magistrate might find that the stripping of the roof and the substitution of another material for the external covering was an alteration which was something more than a repair, and consequently did not come within the exception; and, by Avory J., that the words "except that of necessary repair" formed an exception only to "any other work" and not to "alteration of a building," and that, the substitution of the new material being an alteration, it was immaterial to consider whether it was a work of necessary repair or not.

Case stated by a metropolitan police magistrate.

An information was laid by the respondent, the district surveyor under the London Building Acts, against the appellant, J. F. Goddard, charging him with having failed to serve a building notice as required by the said Acts.

At the hearing the following facts were proved or admitted:—Certain premises known as the Crystal Palace Tavern, situate at 105, Tanners Hill, Deptford, are in the occupation of one Robert Winwood. The premises have a flat wooden roof with a wooden dormer covering an approach staircase about 7 ft. 8 in. in length by 3 ft. 6 in. in width constructed thereon, and being from about 6 ft. 2 in. to 7 ft. 1 in. in height above the roof level. The roof and

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dormer are boarded over, and before the execution of the works hereinafter described the boarding, so far as the roof was concerned, was covered with a layer of zinc, the dormer being covered with tarred felt. The superficial area of the roof and dormer is about 800 feet. The zinc covering of the roof and the felt covering of the dormer became defective and in need of repair, and, acting on the instructions of the owner or occupier of the premises, the appellant removed the zinc covering from the flat roof and laid a coating of asphalte on a layer of felt on the boarded covering of the roof. A similar external covering of asphalte was applied to the dormer on the sides, ends, and top, expanded metal being fixed on the sides and ends to provide a key for fixing the asphalte. The asphalte constituted an external covering to the roof in place of the zinc removed, and in place of the felt on the dormer. The work did not affect the construction of any external or party wall. The appellant did not give the respondent a building notice under s. 145 of the London Building Act, 1894, before commencing the work.

The appellant contended (1.) that the work executed by him was not a "building structure or work" within the meaning of s. 145 (1), and that notice to the district surveyor was not required; and (2.) that the work executed was work of "necessary repair" only within the meaning of s. 209.

The magistrate was of opinion

1. That on the grammatical construction of s. 209 the exception of "necessary repair not affecting the construction of any external or party wall" is an exception from "other work" only and is not an exception from "addition" or "alteration."

(1) By s. 145 of the London Building Act, 1894, "In the following cases and at the following times (that is to say):—

"(*a*) Where a building or structure or work is about to be begun then two clear days before it is begun; . . . .

the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work. . . ."

By s. 209, "Every addition to or alteration of a building and any other work made or done for any purpose in to or upon a building (except that of necessary repair not affecting the construction of any external or party wall) shall so far as regards such addition or alteration or other work be subject to the provisions of this Act and of byelaws thereunder relating to new buildings."

2. That where a roof is stripped and an entirely new material is laid on it, that is something more than a repair; it is an alteration.

3. That the work executed brought the case within the operation of s. 145 and that a building notice should have been given to the respondent.

He accordingly convicted the appellant subject to a case for the opinion of the Court.

Macmorran, K.C., and *Naldrett*, for the appellant. What was done in the present case was not "work" within the meaning of s. 145. In *Venner* v. *M'Donell* (1) the Court held that some limitation must be placed on that general term. Wills J. said: "It is obvious that if the expression 'structure or work' is to receive what, apart from the subject-matter to which it is applied, would be its natural meaning, no person within the jurisdiction of the London County Council could repair his roof, or mend his windows, or put up a fixed cupboard in his bedroom, or a fitted book-case in his library, or a new kitchen range, or introduce gas, water, or electric light into his house, without giving notice to the district surveyor, and without being subject (s. 138) to his supervision, nor without in the case even of the most trivial matters paying him half of the fee to which he would be entitled on the original construction of the house or building to or on which any addition, alteration, or other work was made or done (Sched. III., Part I.). It seems impossible to suppose that interference so constant, vexatious, useless, and costly with the daily life of a great community can have been intended; and we are therefore driven to the conclusion that some limitation must be put upon the natural meaning of 'structure or work.'" There the magistrate had held that the erection from time to time of movable seating at the Agricultural Hall capable of accommodating 3000 persons was the beginning of a structure or work within the section; and the Court reversed his decision, holding that, to come within the section, the work must be something ejusdem generis with building. That covers the present case. Secondly, the magistrate was wrong in holding that the exception of necessary repair in s. 209 was not to be read with "alteration of a building." The language in s. 9 of the Metropolitan Building Act,

(1) [1897] 1 Q. B. 421, 425.

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1855 (18 & 19 Vict. c. 122), was almost identical—"Any alteration, addition, or other work made or done for any purpose, except that of necessary repair not affecting the construction of any external or party wall, in, to, or upon any old building" shall be subject to the regulations of the Act; and in *Badger* v. *Denn* (1), a case decided under that section, the Court held that the exception was an exception from "alteration" as well as "other work." There a builder having repaired the brickwork on each side of a doorway with fresh bricks, and in so doing having slightly contracted the opening of the doorway, the Court held that the alteration was a work of repair and that a building notice was not necessary. Lord Campbell said: "Nothing would be more vexatious than to prevent alterations without having some public good in view, and therefore the Legislature has introduced this most reasonable exception to the general power of the surveyor." That case must be regarded as an authority equally under the present Act, for the slight transposition of some of the words in the section do not affect its meaning.

Ryde, K.C., and *R. W. Turner*, for the respondent. The preamble to the Act of 1894 recites as one of the objects of that Act the making of provisions for the diminution of the danger arising from fire, and s. 61, in furtherance of that object, requires that roofs of buildings shall be covered with incombustible materials. The district surveyor, on whom the duty of supervising buildings is imposed by s. 138, must satisfy himself that s. 61 has been complied with. It is therefore highly important that when any alteration is going to be made in the external covering of a roof that notice should be given to the district surveyor, and there is good reason why such an alteration should be regarded as "work" within s. 145. The case of *Venner* v. *M'Donell* (2) does not conflict with this contention, for the ground of that decision was that no part of the seating touched the external walls of the hall, and consequently was not work done to or on a building, whereas here the work was done to the roof, which was part of the building. With regard to s. 209, the magistrate was right in holding that the exception of repair was only to be read with "other work." Under the Act of 1855 the exception no doubt did apply to "alteration," but the language of

(1) (1858) 22 J. P. 129. (2) [1897] 1 Q. B. 421, 425.

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that Act has been purposely altered so as to exclude the exception from any longer so applying. The words of the present section cannot grammatically be read as contended by the appellant. Further, the magistrate was right in holding that the substitution of one material for another was something more than a repair. Parliament may have thought that, if the surveyor passed a particular material when surveying a new building, it was not necessary that he should pass it again when repairs were needed, provided those were to be effected with the same kind of material; but that it was necessary when a different material was used for the repairs. In *Badger* v. *Denn* (1) the brickwork was repaired with bricks, and the woodwork with wood; there was no change of material; while the contraction of the doorway was not a matter with which the district surveyor would have any right to interfere. In any case the question whether the work done was more than repair was a question of fact, and if there was evidence on which the magistrate could hold as he did the Court would not interfere with his finding. The Court cannot go the length of deciding that stripping a roof and covering it with new material could never be more than repair. But assume that it was a repair, to come within the exception it must be a "necessary repair," and, though the repair of the roof may have been necessary, there is nothing in the case to show that it was necessary to repair it with asphalte.

Macmorran, K.C., in reply.

VISCOUNT READING C.J. The question in this case is whether the magistrate was right in convicting the appellant for failing to give notice to the district surveyor under s. 145 of the London Building Act, 1894. The magistrate has found that on the premises in question there was a flat wooden roof with a wooden dormer, the roof being covered with zinc and the dormer with tarred felt. It became necessary to repair the roof, and the appellant removed the zinc cover of the roof and the felt cover of the dormer and laid a coating of asphalte on a layer of felt on the roof and covered the dormer with asphalte on the sides, ends and top. This asphalte constituted the external covering in the place of the zinc on the roof and the felt on the dormer. The contention on behalf of the appellant is that the

(1) 22 J. P. 129.

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work so done by him was not " work " within s. 145, which requires that a building notice shall be given " where a building or structure or work is about to be begun," and further that it was work of " necessary repair " and therefore did not come within the provisions of s. 209, which says that " Every addition to or alteration of a building and any other work made or done for any purpose in to or upon a building (except that of necessary repair) " shall be subject to the provisions relating to new buildings, including those requiring building notices. Now the work which was done was in one sense no doubt an alteration of a building, and the question is whether it was an alteration done for the purpose of necessary repair, or an alteration not done for that purpose. I am not prepared to hold that the mere substitution of one material for another in the course of the work of repairing would necessarily constitute an alteration of the latter kind, and if the affirmance of the conviction involved that conclusion I should have felt compelled to dissent from the view of the magistrate, but I do not think that that is a conclusion to which I am driven. Whether particular work comes within the one category or the other must be a question of degree depending on the special circumstances of the particular case, and therefore one of fact ; and that being so, although I am not convinced that I should have found in the same way as the magistrate if I had had to decide the question in the first instance, I do not think that I can interfere with his finding. I was impressed by the last point made by Mr. Ryde, that, although it was necessary to remove the zinc, there was nothing to show that it was necessary to replace it with material of a different kind ; and it may well be that it was thought desirable to make the alteration in the roof by substituting asphalte for zinc, and that as the work of repairing was then being undertaken it was thought a convenient moment at which to do it. I cannot help thinking that that was a consideration which may have influenced the magistrate in arriving at his conclusion, and if it was I ought not to differ from him.

With reference to the language of the Act, I am prepared to subscribe to the views expressed by Wills J. in *Venner* v. *M'Donell* (1) so far as they are of a general character. I do not think that they assist us in the determination of the particular

(1) [1897] 1 Q. B. 421.

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matter before us, but they show that some limitation must be placed on the meaning of the word "work" in s. 145. In *Badger* v. *Denn* (1), where the builder in repairing the brickwork on each side of a doorway slightly contracted the opening, thereby to some extent affecting the construction of the external wall of the building, the Court held that the alteration might be treated as one of repair, but they went on the ground that the contraction was so trifling that it might be disregarded, and therefore I do not think that my present decision in any way conflicts with what the Court there held. In the view I have taken it does not become necessary to draw any distinction between s. 9 of the Metropolitan Building Act, 1855, and s. 209 of the Act of 1894. The language is not precisely the same, although very nearly so, and I do not propose to express any opinion upon it. In my opinion this appeal must be dismissed.

RIDLEY J. I have come to the same conclusion, though with some difficulty. If I had to form my own opinion upon this matter I should say that the work done was work of necessary repair. It is a question of fact, and the circumstances of each particular case may differ in a very small degree and yet they may make all the difference in the conclusion at which one ought to arrive. Here the magistrate seems to have thought that the stripping of the roof and the laying an entirely new material upon it could not be done for the purpose of repair. With that view I cannot agree. If the substitution of asphalte for zinc were applied only to a small portion of the roof, I think it would be admitted to be a mere case of repair; and I think it can make no difference that it is applied to the whole. The purpose with which the substitution is made would be precisely the same in both cases. However, as I have said, it is a question of fact, and I do not propose to dissent from the magistrate's finding. I concur in my Lord's judgment, though with some hesitation.

AVORY J. I am of opinion that the magistrate in this case was right in the construction which he put upon s. 209 of the London Building Act when he said that the exception of "necessary repair" is an exception from "other work" only and is not an

(1) 22 J. P. 129.

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exception from "addition" or "alteration." In my view the wording of the section has been deliberately altered from the wording of s. 9 of the Metropolitan Building Act, 1855. Under that section it was tolerably clear that the work of necessary repair was an exception to "alteration" as well as to "other work," and for that reason I think the case of *Badger* v. *Denn* (1) is not of much assistance to us in the present case. It seems to me impossible to read s. 209 in the manner suggested by Mr. Macmorran, namely, "Every addition to or alteration of a building made or done for any purpose in to or upon a building except that of necessary repair." To talk of an alteration of a building "in to or upon a building" seems altogether unintelligible. It seems to me that those words can only be read with "other work." The section first deals with an addition to or alteration of a building, and then it deals with other work made or done for any purpose in to or upon it, and from those latter words there is an exception provided of necessary repair. If that is right, then the real question in this case was whether there was an alteration of the building within the meaning of the section, for if there was it was immaterial to consider whether what was done was a work of necessary repair. In my opinion there was evidence on which the magistrate might find that what was done was an alteration of a building. I think he was right in so finding for this reason, that the external covering of the roof of a house in the metropolis is a matter of substantial importance. Sect. 61 of the Act shows that that is so, for it provides that the roof of every building and every dormer placed on the roof shall be externally covered with incombustible materials. As soon as a person makes an alteration to a building by substituting a new kind of external covering to the roof and dormer he is bound to give notice under the Act in order that the district surveyor may have an opportunity of seeing whether the provisions of the Act have been complied with. For these reasons I think the magistrate was right and the appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. E. Adams.*

Solicitors for respondent: *Hicklin, Washington & Pasmore.*

(1) 22 J. P. 129.

J. F. C.

THE KING *v.* COMMISSIONERS OF INLAND REVENUE.

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May 17.

Revenue—Excess Profits Duty—Computation of Profits—Remuneration of Manager depending on Profits—Discretion of Commissioners—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *Sched. IV., Part I., par.* 5.

By Part I., par. 5, of Sched. IV. of the Finance (No. 2) Act, 1915, which deals with the computation of profits for the purposes of excess profits duty, "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires":—

Held, that proof of the fact that the remuneration of the managers of the business depends on the profits does not render it obligatory on the Commissioners to allow the whole of such remuneration to be deducted, but leaves it to their discretion to say whether the deduction of any and what portion of the amount by which such remuneration exceeds that of the last pre-war trade year shall be allowed.

Rule for a mandamus to the Commissioners of Inland Revenue.

William France Fenwick & Co. was a limited company formed for the purpose of acquiring a wharfage business in London and certain trading steamers. By an agreement, dated February 10, 1909, between the company and their three managing directors the company agreed to pay them as remuneration for their services a sum of 5000*l.* per annum and 10 per cent. of the net profits of the business to be divided between the three in certain proportions. The Commissioners of Inland Revenue, for the purposes of excess profits duty, assessed the excess profits of the company for the accounting period ending December 31, 1915, at 119,506*l.*, and refused to allow the full remuneration of the said managing directors to be deducted in the computation of the profits. The amount of the percentage of profits paid to the said directors for the last pre-war trade year was 7056*l.* The amount of the percentage paid to them for the accounting period ending December 31, 1915, was

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18,098*l.* The Commissioners were prepared to allow a deduction of 2000*l.* in addition to the 7056*l.* for the purpose of arriving at the net profits of the company, but refused to allow any further deduction. The company claimed that they were bound to allow the whole remuneration to be deducted, and obtained a rule nisi for a mandamus to them to allow it.

Sir Frederick Smith, A.-G., Branson, and *Parr,* for the Commissioners, showed cause. By s. 38 of the Finance (No. 2) Act, 1915, there is imposed a duty "on the amount by which the profits arising from any trade or business . . . . in any accounting period which ended after the 4th day of August, 1914 . . . . exceeded, by more than 200*l.*, the pre-war standard of profits." By s. 40, sub-s. 1, the profits are to be "determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act"; and by Sched. IV., Part I., par. 5, "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires." The effect of that paragraph is to give the Commissioners a discretion whether they will allow a deduction in excess of what was allowed in the last pre-war trade year, as well where the remuneration of the managing directors depends on the profits as where there are found to be special circumstances of any other kind. How wide the powers of the Commissioners are is shown by s. 40, sub-s. 3, which empowers them in the several cases therein specified to "allow such modifications of any of the provisions of that schedule" (Sched. IV.) "as they think necessary in order to meet the particular case." If the company here are right in their contention it would be in their power to do away with the whole of the excess profits by increasing the remuneration of the directors. It is true that no change in the terms of the directors' remuneration has been made

since the beginning of the war, and the amount of it has only been swelled by the increase of the profits. But precisely the same objection would arise if a change in the terms of the agreement were made at the present date.

Sir John Simon, K.C., *Disturnal, K.C.*, and *Bremner*, in support of the rule. Prima facie the profits of a business are to be computed for the purpose of excess profits duty on the same principle as they would be computed for the purpose of income tax: s. 40, sub-s. 1; and for the purpose of income tax the whole of the directors' remuneration would be clearly deductible, whether it was dependent on the profits or not. The question is whether that principle has been modified by par. 5 of Sched. IV. to the extent contended for by the Crown. It must be conceded that in respect of the first of the two conditions specified in par. 5, that of the existence of special circumstances, the Commissioners have in one sense a discretion whether they will otherwise direct or not; but it is contended that in respect of the second condition they have none. This contention does not involve the giving of a different meaning to the words "otherwise direct" according as they are applied to the one condition or the other. It is important to bear in mind the precise point of time at which the admitted discretion in the former case arises. Whether special circumstances exist or not in any particular case is a matter of opinion on which different minds will differ, and there is room for discretion in finding that such special circumstances exist. Whether the directors' remuneration is dependent on the profits is a question, not of opinion, but of fact, and there is no room for discretion in arriving at the conclusion that it does so depend. But in both cases, when once it is found that the condition is satisfied, whether it be in the existence of special circumstances or in the source of the remuneration, it equally becomes imperative on the Commissioners to "otherwise direct." The suggestion that it would be open to the company to defeat the provisions of the Act by increasing the remuneration of the directors up to a point at which excess profits would disappear is expressly negatived by the last sentence of par. 5, which says that "No deduction shall be allowed in respect of any transaction or operation of any nature, where it appears, or to the extent to which it appears, that the transaction or operation has artificially reduced

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the amount to be taken as the amount of the profits of the trade or business for the purposes of this Act."

VISCOUNT READING C.J. This is an application by William France Fenwick & Co. for a writ of mandamus directed to the Commissioners of Inland Revenue ordering them to give directions for the deduction of the whole remuneration paid to the managing directors of the company for the purpose of ascertaining the profits returnable by the company as excess profits. The question involved depends entirely upon the meaning properly attributable to the language of par. 5 of Sched. IV., Part I., of the Finance (No. 2) Act, 1915. The question is whether the Commissioners are bound by the language of the schedule to allow the deduction of the remuneration to the managing directors, which depended on the profits of the business, in order to arrive at the excess profits duty payable by the company. It is necessary to bear in mind that the charge is imposed on the company. Now the excess profits duty is to be charged by virtue of s. 38 of the Finance (No. 2) Act, 1915. By s. 39 that duty is to apply to all trades or businesses carried on in the United Kingdom except, amongst others, "offices or employments." It is not disputed that the office of a managing director would in the ordinary course come within those words. But by s. 40, sub-s. 1, it is provided that the profits for the purpose of excess profits duty are to be computed on the same principles as profits are computed for the purpose of income tax "subject to the modifications set out in the First Part of the Fourth Schedule to this Act." That means that in order to make a return of excess profits upon which duty is payable the company would (leaving the Fourth Schedule out of sight for the moment) be entitled to deduct from its profits the remuneration paid to the directors by way of percentage on the profits, because that would be an expense of earning the profits and would not be gain or profit within the meaning of the Income Tax Acts. Therefore if the matter stood there such payments ought not to be brought into the calculation for the purpose of arriving at the excess profits. But Sched. IV., Part I., contains certain special directions as to the mode of computing the profits. By par. 5 it is provided that any deduction allowed for the remuneration of directors shall, as a

general rule, not exceed the sum allowed for that purpose in the last pre-war trade year. It may have been thought that that might lead to injustice, and accordingly Parliament provided for it, and excepted from the general rule cases in which the Commissioners "owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct." With regard to the first of those conditions, the existence of special circumstances, it is not disputed that it is entirely within the discretion of the Commissioners whether they will so direct or not. It is for them to determine whether the facts and circumstances established constitute special circumstances upon which they will exercise their discretion. If they find there are no special circumstances there is no discretion; if they find there are, there is a discretion. No doubt what was thought was that there might very well arise conditions which would make it fair and reasonable that some further remuneration should be paid during the war year. It was thought impossible to prescribe what was to happen in every conceivable condition of things connected with the trade and business of the whole country during the war, and Parliament solved the difficulty by giving this wide discretion to the Commissioners. I now pass to the second condition, which is the fact that the remuneration of the directors depends on the profits of the trade or business. It is contended with regard to that condition that, when once the Commissioners have found that the remuneration of the directors depends on the profits of the trade or business, they have no longer any discretion, and it is obligatory on them to give the direction. The whole question is whether that is a proper interpretation of the clause. I cannot think that it is. It seems to me that the introduction of the sentence beginning with the words "or to the fact" was for the purpose of pointing to that fact of the remuneration depending on the profits as being a circumstance which may be taken into account by the Commissioners in the exercise of their discretion. I cannot read the clause as imposing on them the statutory obligation in all circumstances, when once they have found that the fact does exist, to allow this deduction from the profits. It follows that the rule must be discharged. I would add that s. 49, sub-s. 2, of the Finance

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Act, 1916 (6 & 7 Geo. 5, c. 24), seems to support this view and to amount to a statutory recognition that the fact of the remuneration of the directors depending on the profits did not ipso facto entitle the company to have that remuneration deducted from the profits, but only if the Commissioners in their discretion so allowed; for it prescribes that the duty in respect of that portion of the excess profits, although payable in the first instance by the company, should be recoverable by them from the directors, because it would be the directors who in such a case were making excess profits during the war as compared with the profits they made in the pre-war trade year, and consequently they must be the persons to bear this charge and not the company. It would be unjust that the company should have to pay the excess profits duty upon this sum and not be entitled to recover it.

RIDLEY J. I am in agreement with my Lord. I rest my judgment on the natural meaning of the words of par. 5. That paragraph provides that no deduction shall exceed the sum allowed in the last pre-war trade year except in two events, and on the happening of either of those two events it seems to me to give a discretion to the Commissioners to say whether the deduction shall be allowed or not. I do not think the words admit of any other construction. Sir John Simon conceded that in the event of there being special circumstances the Commissioners had a discretion, but said that if they found as a fact that the remuneration depended on the profits they had none. I cannot think that that is a proper interpretation of the clause. It is open to the objection that it gives a different meaning to the same words "otherwise direct" according as they apply to the one event or to the other. I think that when Parliament used the words "unless the Commissioners of Inland Revenue, owing . . . . to the fact that the remuneration . . . . depends on the profits of the trade or business, otherwise direct," they meant to leave the direction to their discretion.

AVORY J. I am of the same opinion. The ground upon which this rule is moved is that the Commissioners are bound by clause 5 of Part I. of Sched. IV. to the Finance (No. 2) Act, 1915, to direct the deduction of the whole of the remuneration paid to the managing

directors. I confess I have been unable since the commencement of this argument to understand how such a construction can be properly put upon the clause. It seems to me to be plain that there are two events in which the Commissioners of Inland Revenue may exercise their discretion. One is where they find that special circumstances exist, the other where they find that the remuneration of the managing directors depends on the profits. Counsel for the applicants said he was not conscious that he was transposing the words of the clause. It may be he was not, but I am conscious that he was asking the Court to transpose the words, and it was impossible to give effect to his argument without transposing them. The argument in effect was this, that the clause ought to be read "Unless the Commissioners of Inland Revenue owing to any special circumstances otherwise direct, or the remuneration of the managers or managing directors depends on the profits of the trade or business." I can see no justification for any such transposition. My Lord has referred to s. 49 of the Act of 1916, and I should like to add one observation with regard to that Act. In the last section of it, s. 69, it is provided that "Part III., of this Act"—which includes s. 49—"shall be construed together with Part III. of the Finance (No. 2) Act, 1915," showing that it was the intention of the Legislature to deal with and possibly to remedy what it thought to be an injustice resulting from the operation of clause 5 in the schedule.

Rule discharged.

Solicitors for prosecutors: *Deacon & Co.*
Solicitor for Commissioners: *Solicitor of Inland Revenue.*

J. F. C.

C. A.
1917
March 12, 13, 15.

[IN THE COURT OF APPEAL.]

JONES AND OTHERS *v.* HATHERTON AND OTHERS.

Licensing Acts—Licence—Renewal—Notice of Intention to Oppose—Service on "the holder thereof"—Service on Holder of Protection Order, who became Holder of Licence before Application for Renewal—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 16, *sub-s.* 3—*Costs payable by Licensing Justices.*

The Licensing (Consolidation) Act, 1910, s. 16, sub-s. 3, provides that, "subject to the provisions of this section, the licensing justices shall not, where the holder of a justices' licence applies for the renewal of his licence, entertain any objection to . . . . the renewal thereof unless written notice of an intention to oppose the renewal of the licence stating in general terms the grounds on which the renewal is opposed, has been served on the holder thereof not less than seven days before the commencement of the general annual licensing meeting."

More than seven days before the general annual licensing meeting notice of intention to oppose the renewal of the justices' licence in respect of licensed premises was served on J., who was carrying on the business on the premises under a protection order. Before the general annual licensing meeting the licence was duly transferred to J., and at that meeting he applied for the renewal of his licence:—

Held, that service of the notice upon J., who was the holder of the licence when the application for renewal was made but not when the notice of opposition was served, was not service on "the holder thereof" within the meaning of sub-s. 3 of s. 16 of the Act.

Decision of Divisional Court [1917] 1 K. B. 148 reversed.

Observations as to payment of costs by licensing justices.

APPEAL from the decision of a Divisional Court (Viscount Reading C.J., Ridley and Low JJ.) upon a case stated by quarter sessions: reported [1917] 1 K. B. 148.

On January 24, 1916, a protection order or temporary authority to sell intoxicating liquors and carry on business on certain licensed premises was duly granted to Jones under s. 88 of the Licensing (Consolidation) Act, 1910, and he thereupon carried on the business until the general annual licensing meeting held on February 14. On February 2 a notice of intention to object to the renewal of the licence at the general annual licensing meeting was served upon Jones by the superintendent of police, under s. 16, sub-s. 3, of the Act, upon the ground that the premises had been ill-

conducted. On February 14, at a special sessions, held before the general annual licensing meeting, the licence was duly transferred to Jones. Later in the day Jones applied at the general annual licensing meeting for a renewal of the licence, and the justices proceeded to hear evidence in support of the objection. Jones was represented by a solicitor and evidence was called in support of the renewal, but no objection was taken in respect of the validity of the notice of objection; the justices refused to renew the licence. Upon an appeal to quarter sessions it was contended that at the general annual licensing meeting there was no jurisdiction to entertain any objection to the renewal of the licence because at the time when the notice of objection was served upon Jones he was not the holder of the licence, and therefore notice had not been served as required by s. 16, sub-s. 3, of the Act. For the licensing justices it was contended that although Jones was not the holder of the licence when the notice was served upon him, yet notice had been duly served upon him under s. 16, because he had received seven days' notice and was the holder of the licence when the application for renewal was heard; and further that any irregularity in service of the notice of objection had been waived.

The Court of quarter sessions found upon the facts that the grounds of objection to the renewal of the licence had been proved, but held that the service of the notice of objection was invalid and bad in law, and stated this case for the opinion of the Court.

Upon the hearing of the special case the Divisional Court held (1) that service of the notice of objection upon Jones, who was the holder of the licence when the application for renewal was made, was service on "the holder thereof" within the meaning of s. 16, sub-s. 3, of the Act of 1910.

Jones and the owners of the premises appealed.

Disturnal, K.C. (*H. H. Joy* with him), for the appellants.

Hon. R. W. Coventry (*Vachell, K.C.*, with him), for the respondents. The arguments were the same as in the Court below, except that the additional point was taken that the Court of quarter sessions had no jurisdiction to state a special case, but as no decision was given on

(1) [1917] 1 K. B. 148.

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that point it is unnecessary to set out the argument. *Blencowe & Co.* v. *Lord Hatherton* (1) was cited.

SWINFEN EADY L.J. This is the appeal of Jones and others, trustees and executors of E. Wright, from the decision of the Divisional Court on a case stated by a Court of quarter sessions. It has reference to the licence of premises known as the King's Arms Inn at Hednesford in Staffordshire, and the appellants are Jones, who is or was the licensed holder of the inn, and the trustees of E. Wright, to whom the premises belonged. The facts are short. One Horne was the owner of the licence, and the appellant Jones on January 24, 1916, obtained an order for temporary protection; he gave notice of his intention to apply at the next special sessions on February 14 for a transfer to him of the licence. February 14 was also the day fixed for the general annual licensing meeting. Notice was given by the superintendent of police to Jones on February 2 of his intention to oppose the renewal of the licence to him at the general annual licensing meeting on the ground that the premises had been ill-conducted. On February 14 the licence was transferred in special sessions to Jones, who thereupon became for the first time the holder of the licence, and later on in the same day the licensing justices at the general annual licensing meeting refused the renewal of the licence. Upon appeal to quarter sessions Jones contended that the refusal of the renewal was invalid, because the notice required by s. 16 of the Licensing (Consolidation) Act, 1910, had not been duly served upon him. The Court of quarter sessions determined that the service of the notice was invalid and bad in law, but at the request of the respondents consented to state a case for the opinion of the King's Bench Division. They then heard the case on the facts and found that the ground of objection to the renewal of the licence was proved, and made an order in accordance with their decision. The case stated put the question for the opinion of the Court in the following terms: "If the High Court of Justice should be of opinion that the decision of the Court of quarter sessions was right on the question of law as to the service of the notice of objection as above stated, then the said decision allowing the said appeal is to be affirmed and the renewal of the licence is to

(1) (1907) 96 L. T. 817; 71 J. P. 210.

be granted to the said Clement James Jones, but if the High Court of Justice should be of opinion that the Court of quarter sessions were wrong on the question of law above stated, then the decision is to be quashed and the appeal dismissed with costs and the renewal of the said licence refused." The special case came before the Divisional Court, who held that the view of quarter sessions was erroneous and that the service of the notice of opposition on Jones was service on the holder of the licence within the meaning of s. 16, sub-s. 3, of the Act. Against that decision the present appeal is brought.

The question turns on the proper construction of s. 16 of the Licensing (Consolidation) Act, 1910; sub-s. 2 provides that "The holder of a justices' licence applying for the renewal of his justices' licence need not attend in person at the general annual licensing meeting unless he is required by the licensing justices to attend, and he shall not be required so to attend save for some special cause personal to himself;" and by sub-s. 3, "Subject to the provisions of this section, the licensing justices shall not, where the holder of a justices' licence applies for the renewal of his licence, entertain any objection to or take any evidence with respect to the renewal thereof unless written notice of an intention to oppose the renewal of the licence stating in general terms the grounds on which the renewal is opposed, has been served on the holder thereof not less than seven days before the commencement of the general annual licensing meeting." At the date when the notice of opposition was served on Jones he was not the holder of the licence, and the question is whether the service was sufficient. In my opinion the notice is to be served on the holder of a licence who is applying for renewal. Sub-s. 2 deals with him, and the person dealt with by sub-s. 3 is such a person; under sub-s. 3 he must be "the holder thereof." It is said that such a construction may cause inconvenience in practice, because there may be cases (the present case is an instance of it) in which seven days' notice cannot be given because the transfer sessions is held within seven days of the general annual licensing meeting. The answer is that such cases are provided for by the next sub-section (sub-s. 4), which says "the licensing justices may, notwithstanding that no notice of intention to oppose the renewal of a justices' licence has been given, on an objection being

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made to the renewal, adjourn the consideration of the renewal to a future day fixed by them . . . . and require the attendance of the holder of the licence on that day when the case will be heard and the objection considered as if notice to oppose had been given"; so that in any cases of difficulty as to giving notice, where the dates are such that full notice cannot be given, the justices may adjourn. Our decision that notice is to be given to the holder applying for renewal is quite consistent with that of *Blencowe & Co.* v. *Lord Hatherton.* (1) It is said that the view we are expressing is a departure from the Licensing Act, 1872, and that we are not to expect a change in the law to be made by the Licensing (Consolidation) Act, 1910. But the same view ought to be taken under the Licensing Act, 1872, s. 42 of which deals with the subject. It says, "Where a licensed person applies for the renewal of his licence he need not attend in person . . . . unless he is required by the licensing justices so to attend"; and further on, "the justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting." The word "holder" had not been previously used in the section. By s. 74 a licensed person means a person holding a licence; a person holding a temporary protection order is not such a person and is not entitled to apply for a renewal of the licence; he must first obtain a transfer of the licence to himself, when he becomes a licensed person, and then he must be served not less than seven days before the meeting with notice of objection to the renewal of his licence. Under both Acts I am of opinion that the person to be served must be the holder of the licence at the date of the service and must also be the person applying for the renewal. The decision of the Divisional Court should be reversed and that of quarter sessions restored.

BANKES L.J. I agree, and differ with regret from the decision of the Divisional Court. It is really sufficient to say that the words "on the holder thereof" in s. 16, sub-s. 3, of the Licensing (Con-

(1) 96 L. T. 817; 71 J. P. 210.

solidation) Act, 1910, mean the person who was at the time of service of the notice the holder of the licence. This is made plain by the other sections of the Act which are applicable to this case. The facts show that on January 24, 1916, Horne was the holder of the licence and that on that day a protection order was granted to Jones under s. 88 of the Licensing (Consolidation) Act, 1910, which provides that "In any case where the transfer of a justices' licence may be authorised" (which I will consider in a moment) "a Court of summary jurisdiction may, if they think fit, as respects any premises situated in their division, on an application made for the purpose by any person . . . . to whom it is proposed to transfer a justices' licence in respect of the premises, grant to him an authority to carry on business on the premises and to sell any intoxicating liquors which may be sold on the premises. . . . ." Jones was therefore at that time a person to whom it was proposed to transfer a justices' licence. His position is dealt with by s. 88, sub-s. 7, which says that "any person to whom a protection order is granted shall, while the order is in force, be subject to the provisions of this Act with respect to the regulation, government, or control of holders of justices' licences, in the same manner as if he were the holder of a justices' licence"; those words quite plainly indicate that, though Jones was not the holder of the licence, he was to be regarded as being under the obligations of a holder; but the section is silent as to any provision that he is to be treated as a holder for all purposes of the Act, which might include the service of a notice of objection upon him. The section deals with cases in which a transfer may be authorized, and transfers are dealt with by s. 22 and s. 23, the latter providing that "For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence." The words "holds or has held" are used because Sched. IV. refers to cases where the holder has given up occupation. In this case, however, Horne remained the holder of the licence. Notice of objection to the renewal was served on Jones, and from one point of view that was service on the right person, because Jones was the person intending to apply for a transfer, and presumably therefore the person who would apply for the renewal. This, however, does not meet the difficulty created by the language

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of the statute. Jones was not the holder of the licence when notice of objection was served on him. The case is one which does not seem to have been contemplated or provided for by the language of the statute.

BRAY J. I am of the same opinion. The case turns on the true construction of certain words in s. 16, sub-s. 3, of the Licensing (Consolidation) Act, 1910. Our first duty is to see what is the natural interpretation of the words. They mean that the person to be served is the holder of the licence at the date of the service. They do not apply to Jones, who did not hold the licence until immediately before the application for renewal. The Lord Chief Justice has said that "the words of the statute might compel me to take a view which would seem to me to be absurd and unreasonable." I do not think it can be said that our interpretation is either absurd or unreasonable. Then he says that he thinks the language used in sub-s. 3 means only that the person who is applying for the renewal must have had at least seven days' notice. I cannot agree with that view. If it had been intended that service should be made upon the person applying for the renewal it would have been perfectly simple to say so. Ridley J. in his judgment says that the result of the interpretation which quarter sessions followed would involve changes in the law; but I am not at all clear as to that; I am not certain that "such holder" does not mean the same thing as "the holder thereof." We have heard an argument on the question whether quarter sessions had power to state a case, but it is unnecessary for us to express any opinion upon that matter. I must, however, say that I think it would be desirable that the Legislature should expressly say in what cases quarter sessions has power to state a case, and also whether there should be a right of appeal from the decision of the Divisional Court on such a case.

Appeal allowed.

Coventry, for the respondents (the licensing justices), asked for costs.

Cur. adv. vult.

March 15. SWINFEN EADY L.J. This case stood over until to-day to be mentioned as to costs in order that the practice of the

King's Bench Division with regard to the costs of licensing justices might be ascertained. The Master of the Crown Office reports to us that he has had the books examined, and he finds that from the beginning of 1911 up to the present time there have been eight proceedings by way of special case from quarter sessions in which the licensing justices have been either appellants or respondents. In five of those cases costs were ordered by the Divisional Court to be paid to the justices. In the remaining three cases—in two of them the justices were respondents and in the third they were appellants—they were ordered to pay costs. The result, therefore, is that in all the cases that have been decided costs have been given either for or against the licensing justices as if ordinary litigants.

In the particular case we are dealing with the justices were respondents in the Court of quarter sessions but they were appellants in the Divisional Court, and, as the parties proceeding upon a special case, the justices entered into recognizances under the Crown Office Rules to pay the costs. The case of *Rex* v. *Salford Hundred Justices* (1) shows that the indemnity against costs to which licensing justices are entitled under s. 32 of the Licensing (Consolidation) Act, 1910, extends to and includes costs ordered to be paid by licensing justices to other parties, and that, whether the costs relate to certiorari or mandamus or are the costs of a special case, they are to be regarded as costs in the appeal. Under these circumstances we are of opinion that in the present case the practice should be followed and that the licensing justices should be ordered to pay costs here and below, they being entitled to obtain repayment by virtue of s. 32 of the statute.

Solicitors for appellants: *Robinson & Bradley, for C. A. Loxton, Walsall.*

Solicitors for respondents: *Field, Roscoe & Co., for J. Selby Gardner, Cannock.*

(1) [1912] 2 K. B. 567.

W. J. B.

1917
May 2.

ANTHONY HORDERN & SONS, LIMITED *v.* COMMONWEALTH AND DOMINION LINE, LIMITED.

[1917 A. 144.]

Shipping—Bill of Lading—Exceptions—Harter Act—Limitation of Liability—Goods above a certain Value—Inconsistency—Construction.

Goods were shipped under a bill of lading expressed to be subject to all the terms and exceptions of the Harter Act, an Act of Congress of the United States which makes it unlawful for the owner of any vessel to insert in any bill of lading any clause whereby he is relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of merchandise, and makes null and void and of no effect all clauses of such import inserted in bills of lading. The bill of lading contained a clause to the effect that the shipowner would not be accountable for any one package which was of a value of more than 100*l.* unless the value thereof was declared and extra freight agreed upon and paid. The shipowner failed to deliver one package worth more than 100*l.* The value thereof had not been declared, nor had extra freight been agreed upon or paid. In an action by the owner of the package to recover its value from the shipowner, who relied upon the clause :—

Held, that the clause was inconsistent with the Harter Act and must be treated as null and void.

Calderon v. *Atlas Steamship Co.* (1897) 170 U.S. 272 considered.

Morris v. *Oceanic Steam Navigation Co.* (1900) 16 Times L.R. 533 distinguished.

Trial of action before Horridge J. without a jury.

The parties agreed in the following statement of facts :—

1. The plaintiffs are owners and consignees of 336 packages of general merchandise shipped on board the steamship *Caldy* at New York. By bills of lading dated October 5, 1915, the defendants acknowledged the receipt of the said goods in apparent good order and condition upon the said vessel, and contracted to carry the same to Sydney and there deliver them in the like good order and condition to the plaintiffs subject to the exceptions and conditions of the said bills of lading. The defendants failed to deliver one package of the said 336 packages. The package contained hosiery and measured 22 ft. 11 in. cubic measurement and was worth 240*l.* 12*s.* 7*d.* It was marked A. H. & S. $\frac{64}{642}$ 19.

2. By clause 3 of the said bills of lading the same are expressed to be subject to all the terms and exceptions of the Harter Act. (1) The bill of lading may be referred to for its full terms.

3. By clause 6 of the said bills of lading it is expressly provided as follows, namely: "The shipowners will not be accountable for any of the articles enumerated in s. 4281 of the United States Revised Statutes, nor for goods of which the value is more than 5*l.* per cubic foot, nor for any one package which is of a value of more than 100*l.*, unless the value thereof shall have been stated in writing both on the broker's order, which must be obtained before shipment, and also on the shipping note presented on shipment, and extra freight agreed upon and paid, and the bills of lading signed with a declaration of the nature and value of the goods appearing thereon; nor for damage to other goods of a brittle or fragile nature, of any description, from whatsoever cause arising."

4. No declaration of the value of the said goods was made in writing either upon a broker's order or upon a shipping note. No extra freight was either agreed upon or paid in respect thereof, and the said bills of lading contained no declaration of the value thereof.

5. The question to be determined is, Whether the defendants in the premises are exempted by clause 6 aforesaid from liability for the said non-delivery of the package. The plaintiffs claim in respect thereof 240*l.* 12*s.* 7*d.*, but the defendants, relying on clause 6 of the bills of lading, deny all liability.

R. A. Wright, for the plaintiffs. Clause 6 of the bill of lading affords the defendants no protection. The words of ss. 1 and 2 of

(1) 52nd Congress, Sess. 2, c. 105 (1893): An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property. Sect. 1: "That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

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the Harter Act are to be read into the bill of lading: *Dobell & Co.* v. *Steamship Rossmore Co.* (1) Then if any clause of the bill of lading is inconsistent with the Act that clause is to be treated as null and void: *McFadden* v. *Blue Star Line.* (2) Clause 6 is inconsistent with s. 1 of the Act: *Calderon* v. *Atlas Steamship Co.* (3) It is not like the clause in *Morris* v. *Oceanic Steam Navigation Co.* (4), whereby the parties agreed the value of each package for the purpose of adjusting the freight. In such cases the shipowner is not liable beyond the agreed value even if the goods are lost by his negligence. The case of *Tuck* v. *America-Levant Line* (5), before Bailhache J., is to the same effect.

C. R. Dunlop, for the defendants. Clause 6 of the bill of lading is not inconsistent with the Harter Act. It does not purport to excuse the shipowners from the duty to take care of the goods or to provide a seaworthy ship. It does excuse them if the goods are lost without their default. If clause 6 applied to protect the shipowners from their negligence the clause in *Morris* v. *Oceanic Steam Navigation Co.* (4) could not have been held valid. If parties may agree that goods of the value of 500*l.* shall be taken as of the value of 100*l.*, and the shipowners may thus escape liability for more than 100*l.* if the goods are lost through their negligence, that contravenes the Harter Act pro tanto. If the goods were valued at nothing, the shipowners would be excused in toto. It must be that clauses of this kind, unlike the clause in *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (6), do not operate to excuse a shipowner when the goods are lost through his negligence. If so, clause 6 of this bill of lading does not conflict with the Harter Act, and, as there is no statement that the goods were lost by negligence or unseaworthiness, the defendants are entitled to rely upon the clause.

HORRIDGE J. In this case the claim is in respect of one package of general merchandise shipped upon the defendants' ship under a bill of lading containing a clause to the effect that the shipowners will not be accountable for any one package which is of a value of more than 100*l.* unless the conditions mentioned in clause 6 of the

(1) [1895] 2 Q. B. 408.
(2) [1905] 1 K. B. 697.
(3) 170 U. S. 272.
(4) 16 Times L. R. 533.
(5) (1914) unreported.
(6) [1908] 1 K. B. 796; [1908] 2 K. B. 626.

bill of lading have been complied with. The conditions were not complied with. The package was never delivered. The defendants rely on the clause. The argument in answer is that by a clause set out in paragraph 2 of the statement of facts the bill of lading is subject to all the terms and exceptions of the Harter Act—in other words, that the bill of lading incorporates the Harter Act into the contract between the parties. That this is the effect of the clause was decided by Lord Esher M.R. in *Dobell & Co.* v. *Steamship Rossmore Co.* (1) The Master of the Rolls there said: "That document"—the bill of lading—"has brought in by reference the provisions of an American Act of Congress, and what we have to do is to construe the bill of lading, reading into it as if they were written into it the words of the Act of Congress. If this is done it will have this effect: that some provisions will appear twice over, because they have put words extremely like those of the Act into the bill of lading, and then introduced the whole of the Act. That would, of course, do no harm, but it is clumsy to the last degree." Therefore I have to take the bill of lading and read into it the Harter Act, and therefore it is necessary to consider the provisions of the Harter Act. [The learned judge read s. 1 of the Act, and proceeded:] This bill of lading therefore provides that there shall be no such clause in it as is prohibited by that section, and that if there is such a clause it shall be null and void. This agrees with the view of Channell J., who in *McFadden* v. *Blue Star Line* (2) said: "The effect of the incorporation of s. 2, which provides that it shall not be lawful to insert a clause in a bill of lading whereby the obligation of the owner to exercise due diligence to make the vessel seaworthy shall be lessened, is as though the parties said 'If we have in the exceptions inadvertently inserted a clause cutting down the obligation in respect of seaworthiness below an obligation to exercise care, that clause shall be null and void.'" Applying that to this case, it is as though the parties had said "If in this bill of lading we have inserted any clause limiting in terms inconsistent with the Act the obligation to deliver, that clause shall be null and void." In my opinion clause 6 of this bill of lading is inconsistent with s. 1 of the Harter Act. It was argued this section only prevents a shipowner from relieving himself of liability for loss from negligence, and is not inconsistent with clause 6 of the

(1) [1895] 2 Q. B. 408, 412. (2) [1905] 1 K. B. 697, 707.

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bill of lading, which relieves him of liability for loss from other causes. I do not agree. In s. 1 of the Act negligence, fault, or failure are placed alternatively, and any one of the three is a matter in respect of which the owner's liability cannot be so limited as to contravene the provisions of the Act. But, further, the defendants seek by clause 6 to protect themselves from the consequences of a non-delivery unexplained. In the words of Bigham J. in *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (1), "To my mind the mere fact of non-delivery is equally consistent with there being no negligence, but the authorities show clearly that non-delivery raises a prima facie presumption of negligence on the part of the shipowner, and therefore, in the absence of evidence to rebut that presumption, I must find as a fact that the loss of the plaintiff's goods was due to the negligence of the defendants." In the present case, therefore, the non-delivery of the goods is shown to have been due to the negligence of the defendants. Clause 6 of the bill of lading is null and void; and the plaintiffs are entitled to recover.

The only authorities to which I need refer are *Calderon* v. *Atlas Steamship Co.* (2), *Morris* v. *Oceanic Steam Navigation Co.* (3), and the judgment of Bailhache J. in *Tuck* v. *America-Levant Line.* (4) In the first case the Supreme Court of the United States decided that a clause in effect the same as the clause in this bill of lading did conflict with the Harter Act. It is true that the Court found negligence on the part of the defendants, but that was not the basis of the judgment. It was the relief of the owners from liability that conflicted with s. 1 of the Harter Act. The Court noticed a difference between cases like the one which they were considering and those cases where the parties have agreed upon the value of cargo as a basis upon which to calculate freight. "In these cases," said Brown J. delivering the opinion of the Court (5), "it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed

(1) [1908] 1 K. B. 796, 800.
(2) 170 U. S. 272.
(3) 16 Times L. R. 533.
(4) Unreported.
(5) 170 U. S. 278.

valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." The Court there deals with a number of cases in the American Courts, but our own Courts afford examples of the same class. In *Morris* v. *Oceanic Steam Navigation Co.* (1) there was a clause "It is also mutually agreed that the value of each package receipted for as above does not exceed the sum of $100, unless otherwise stated herein, on which basis the rate of freight is adjusted, and that the ship and carrier shall not be liable for articles specified in s. 4281 of the United States Revised Statutes, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading." That clause provided for two things—first, the value of each package should be taken to be $100, and, secondly, that the carrier and ship should not be responsible for certain articles unless notice of their nature was given. As to the question of value, there was no provision that the ship should not be liable beyond $100 a package, but only that each package was to be taken as of that value; and although there was discussion upon the Harter Act, it was not addressed to the point that this clause conflicted with the Act. The point did not really arise, because these clauses are taken as providing for the shipment of goods of an agreed value. The last case is *Tuck* v. *America-Levant Line.* (2) By the bill of lading in that case it was mutually agreed that the shipment was subject to all the terms and provisions and all the exemptions from liability contained in the Harter Act, and it was also mutually agreed "that the value of each package receipted for as above does not exceed the sum of $100, unless otherwise stated herein, on which basis the rate of freight is adjusted." Bailhache J. said: "The defendants contend that by virtue of that provision they are not liable to the plaintiffs in respect of any one package beyond the $100 unless the value has been declared; but I understand that no value has been declared; and I think the defendants on that point are right. It is suggested on the other side that it was a provision which is practically precluded

(1) 16 Times L. R. 533. (2) Unreported.

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Horridge J.

by the Harter Act. I do not agree. That certainly is not the law in the United States, and I do not think it is the class of provision which the Harter Act looks to and excludes. On this point I propose to follow *Morris* v. *Oceanic Steam Navigation Co.* (1), which in my opinion was rightly decided and which, so far as I know, has been followed ever since." The Supreme Court of the United States in *Calderon* v. *Atlas Steamship Co.* (2) recognized the validity of these agreements upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation. In my view *Morris* v. *Oceanic Steam Navigation Co.* (1) and *Tuck* v. *America-Levant Line* (3) are examples of this class. The present case is not. The only way in which to make its clauses consistent is to treat clause 6, which conflicts with s. 1 of the Harter Act, as null and void. There must be judgment for the plaintiffs for 240*l.* 12*s.* 7*d.*

Judgment for plaintiffs.

Solicitors for plaintiffs : *Thain Davidson & Co.*
Solicitors for defendants : *Holman, Birdwood & Co.*

(1) 16 Times L. R. 533. (2) 170 U. S. 272.
(3) Unreported.

W. H. G.

ATTORNEY-GENERAL *v.* WATSON AND OTHERS.

1917
May 9.

Revenue—Estate Duty—Property passing on Death—Benefit accruing from Cesser of Interest—Cesser of Annuity payable out of Residuary Estate—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7 (*b*).

By s. 1 of the Finance Act, 1894, "In the case of every person dying" estate duty shall "be levied . . . . upon the principal value . . . . of all property . . . . which passes on the death of such person . . . ."

By s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include . . . . (*b*) Property in which the deceased . . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . . ."

By s. 7, sub-s. 7, "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

By his will a testator bequeathed an annuity of 1000*l.* per annum to be paid out of his residuary estate, and primarily out of the income thereof, during the life of the annuitant or such less period as in the will mentioned :—

Held, that the annuitant had an interest in the testator's residuary estate within the meaning of the above sections, and that upon the annuitant's death estate duty became payable in respect of the benefit which accrued to the residuary estate upon the death of the annuitant by the cesser of the annuity.

INFORMATION by the Attorney-General on behalf of the Crown.

Charles Edward Chrimes, late of Selwood, Rotherham, in the county of York (hereinafter called "the testator"), made his will, dated August 25, 1913, and thereby, after appointing the defendants executors and trustees thereof and making certain pecuniary and specific bequests, bequeathed, among other annuities, an annuity of 1000*l.* per annum to his sister, Ellen Smith Weir, to be paid out of his residuary estate, and primarily out of the income thereof, during the lives of the respective annuitants or such less period as thereinafter mentioned, and directed that each annuity should commence from the day of his death, and should be paid by equal quarterly payments, the first of such quarterly payments to be made

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ATTORNEY-GENERAL v. WATSON.

at the end of the three calendar months from the commencing period; and after giving further pecuniary legacies and making certain specific devises and bequests, the testator directed that, subject as aforesaid, the residue and remainder of the moneys arising from the real and personal estate to which he should be entitled, or over which he should have a power of testamentary disposition at his death, after providing for all the payments directed to be made thereout, and all estate, legacy and succession duties which might become payable in respect of any part of his estate or any of the devises or bequests thereby made, should be divided into seven equal parts and go and belong as therein expressed. The testator died on November 28, 1914, and his will was duly proved by the defendants on January 29, 1915. The testator's sister, Ellen Smith Weir, survived the testator, and died on November 30, 1914.

The information alleged that upon the death of Ellen Smith Weir estate duty became payable in respect of the benefit which accrued to the testator's residuary estate by the cesser of the annuity by the testator's will charged in her favour upon his residuary real and personal estate and the income thereof, and that by virtue of s. 7, sub-s. 7 (*b*), of the Finance Act, 1894, the value of that benefit was the principal value of an addition to the residuary estate equal to the income to which the annuity of 1000*l.* extended, subject, so far as the same was charged on and payable out of real estate and the income thereof, to the reduction of 50 per cent. allowed in the circumstances by s. 15 of the Finance Act, 1914 (4 & 5 Geo. 5, c. 10).

The informant prayed (inter alia) that it might be declared that upon the death of Ellen Smith Weir estate duty became payable in respect of the benefit which accrued or arose to the testator's residuary trust estate upon her death by the cesser of the annuity.

By s. 1 of the Finance Act, 1894, "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty' . . . ."

By s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include the property following, that is to say;

. . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . . ."

By s. 7, sub-s. 7, " The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

Sheldon, for the informant. The deceased Ellen Smith Weir had an interest in the testator's residuary estate which ceased on her death within the meaning of s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, and the value of the benefit which accrued from the cesser within the meaning of that sub-section and s. 7, sub-s. 7 (*b*), was the amount of the capital sum which at the same average rate of interest as the whole residuary estate yielded would produce the annuity of 1000*l*. The residue had an accretion to that extent. The annuity was charged upon the corpus as well as the income of the estate. The amount of the capital freed from the annuity was the property which passed. Although no specific property was freed the residuary legatee received a benefit: *Lord Advocate* v. *Henderson's Trustees* (1); *Inland Revenue* v. *Maclachlan*. (2)

Disturnal, K.C., and *A. Underhill*, for the defendants. The deceased Ellen Smith Weir had only the right to receive 1000*l*. per annum payable quarterly. That amounted to nothing more than a right to recover the 1000*l*. per annum out of the estate—a right possessed by every legatee. She was entitled to receive a legacy of 1000*l*. in each year if she should be alive. In other words, the 1000*l*. per annum was a contingent legacy accruing from day to day. It was a legacy payable by instalments. The deceased had no interest in the testator's residuary estate other than that of a creditor. A residue does not exist until legacies including annuities are paid. The annuity was not payable out of any specific portion of the estate. In order that the informant may succeed it is necessary to show that the annuitant had an interest in the whole residuary estate. *Lord Advocate* v. *Henderson's Trustees* (1) is distinguishable. The circumstances in that case were equivalent

(1) (1905) 42 S. L. R. 720. (2) (1899) 36 S. L. R. 727.

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to those which would exist in England if a rent-charge upon realty were created. The fact that the case of an annuity purchased by a deceased person is expressly provided for by s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, shows that no other annuity was contemplated by the Legislature as being within the purview of the statute. [*In re Campbell* (1) and s. 8, sub-s. 4, of the Finance Act, 1894, were also referred to.]

Sheldon in reply. In order that the informant may succeed it is not necessary to show that the annuitant had any property in the testator's residuary estate; it is sufficient if she had an interest in it. The reason that the case of a person buying an annuity for himself was specially dealt with by s. 2, sub-s. 1 (*d*), of the Act of 1894 was that when the person dies his interest simply ceases, and sub-s. 1 (*d*) therefore provides that that case is to be dealt with notionally as if the cesser of the annuity increased his estate.

LUSH J. In this case the Crown by information claims a declaration that upon the death of an annuitant to whom an annuity was bequeathed by the testator estate duty became payable in respect of the benefit which accrued or arose to the testator's residuary estate on the death of the annuitant by the cesser of the annuity. [The learned judge having referred to the material sections of the Finance Act, 1894, continued:] On behalf of the Crown it was contended that when the annuitant died the corpus of the testator's residuary estate was property in which the annuitant had had an interest, her interest ceasing upon her death, and that consequently that property should for the purpose of this information be treated as property passing on the death to the extent to which a benefit had accrued or arisen by reason of the cesser. The testator had in fact directed (although I do not think it is material) that the annuity should be paid out of his residuary estate and primarily out of the income thereof. The contention on behalf of the Crown is that the annuitant, although she had no estate in the residuary estate, still had an interest in it, because it was out of these funds that the annuity was payable under the will of the testator. Even if the testator had not added the words with reference to the mode of payment of the annuity primarily out of the income it

(1) [1902] 1 K. B. 113.

would of necessity have been payable out of the general corpus of the property which was the subject of the will of the testator. But if the direction does make a difference there was the express direction in the will.

On behalf of the defendants it has been contended that the annuitant had no interest in the corpus, and that no annuitant can be said to have an interest in the property out of which the annuity is payable unless the property has been actually appropriated and set apart to answer the annuity. If that is so of course the contention on behalf of the Crown fails, because there has here been no express appropriation or setting apart of any specific property to answer this annuity. But in my judgment that is not the true interpretation to be placed upon s. 2, sub-s. 1 (*b*), of the Finance Act, 1894. The object of the section is to make estate duty payable whenever there has been a succession in fact, or that which is equivalent to a succession—whenever there has been a cesser of an annuity by reason of the death of the annuitant, which cesser causes a benefit to accrue to that property. And I think one is bound to construe the words " had an interest " in the wider sense and not to restrict the words, and put upon them the narrower meaning for which Mr. Disturnal has contended on behalf of the defendants. In my judgment this annuitant had, according to the ordinary use of language, an interest in the corpus of this property ; she had an annuity accruing from day to day, payable out of the property, and it was to that property that the annuitant would necessarily look for the payment of her annuity. It is true she had no estate in the property, but she had an interest in it, because that was the source of the annuity bequeathed to her by the testator. It was the fund to which she could look and to which she was entitled to have recourse, and even to claim to have realized for the purpose of paying the annuity.

It is said there has been no case in which this question has been raised. It may be so—I do not know of any case in England ; but I am not at all sure that it was not assumed in *Lord Advocate* v. *Henderson's Trustees* (1) that the annuitant had an interest in the property out of which the annuity was payable, because it appears by the very short recital of the material clause in the will contained

(1) 42 S. L. R. 720.

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Lush J.

in the report, that the direction with regard to the payment of the annuity was not different in substance from that contained in the will in the present case. On behalf of the defendants Mr. Disturnal contended that the direction in that case (1) was different because there the testator created a rent-charge in favour of the annuitant. If so, it might be true to say that the annuitant had something more than an intangible interest in the property—that the annuitant had in substance a rent-charge. But I do not think the contention is correct. I think the direction there was equivalent to that which this testator gave in his will, and if so—it is true the point was not argued, but it was assumed both by counsel and by the Court—it was treated as apparent that the annuitant had an interest, and the only question argued and decided by the Court was as to the method of calculating the benefit that accrued. But whether that be so or not, and putting the Scotch case (1) aside, it seems to me that the only reasonable view to take of s. 2 of the Finance Act, 1894, is that it brings within the ambit and scope of the Act every case in which an annuitant has a right to have recourse to the property out of which the annuity is payable and to make estate duty payable to the Crown when the annuitant dies, provided that by reason of the annuitant's death a benefit has accrued or arisen to the property. Those conditions having been fulfilled in the present case, I think that the Crown's contention is right and that I must make the declaration asked for by the Crown.

Judgment for Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Pilgrim & Phillips, for Watson, Esam & Barber, Sheffield.*

(1) 42 S. L. R. 720.

J. E. A.

STEBBING *v.* LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED.

1917
May 18.

Insurance—Statement forming Basis of Contract—Arbitration Clause—Difference arising out of Policy—Truth of Statement—Validity of Policy—Burden of Proof.

A policy of insurance contained a clause referring to the decision of an arbitrator "all difference arising out of this policy." It also contained a recital that the assured had made a proposal and declaration as the basis of the contract, and a clause to the effect that compliance with the conditions indorsed upon the policy should be a condition precedent to any liability on the part of the insurers. One of the conditions provided that if any false declaration should be made or used in support of a claim all benefit under the policy should be forfeited.

In answer to a claim by the assured the insurers alleged that statements in the proposal and declaration were false:—

Held, that the truth or untruth of the statements was a matter referred to the arbitrator.

Held, also, that the burden of proving that the statements were untrue lay upon the insurers.

AWARD in the form of a special case stated by an arbitrator under s. 19 of the Arbitration Act, 1889.

The Liverpool and London and Globe Insurance Co., Limited (hereinafter called "the company"), issued to Sidney Stebbing (hereinafter called "the claimant") a policy of insurance dated July 21, 1915, indemnifying the claimant against loss or damage by or in connection with burglary. The policy contained a recital to the effect that the claimant had submitted to the company a proposal and declaration with certain written statements and particulars "as the basis of the contract," and provided that "compliance with the conditions indorsed on this policy shall be a condition precedent to any liability on the part of the company." Condition 2 indorsed on the policy was as follows: "On the happening of any loss or damage the" claimant "must forthwith give notice in writing to the company and must within thirty days or such further time as the company may allow deliver to the company a claim with such particulars and details as are reasonably

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practicable, and if the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, all benefit under this policy shall be forfeited."

The proposal was in writing signed by the claimant and dated July 7, 1915, and therein the claimant declared as follows: "I declare that the answers in this proposal are full and true; that I have withheld no information whatever that might tend in any way to increase the company's risk or to influence their decision regarding this proposal . . . . I agree that this proposal and declaration shall be the basis of the contract between me and the company, and I agree to accept a policy subject to the usual conditions indorsed thereon and to pay the premium when called upon to do so."

On May 3, 1916, the claimant gave notice to the company that he had sustained a loss by burglary on the night of May 2, and claimed that by the terms of the policy he was entitled to be indemnified by the company against the loss. The company did not admit the loss and required that the dispute should be referred to arbitration in accordance with condition 6 which was indorsed upon the policy and was in these terms: "All difference arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference . . . ."

After a correspondence had taken place between the parties a single arbitrator was jointly appointed. On December 1, 1916, the parties appeared before him and it was agreed that the grounds on which the company resisted the claim were: 1. That it was not admitted that the claimant's goods were lost by burglary; 2. That the policy was void because of suppression of material facts and because the claimant had made untrue answers in the proposal form.

At the hearing before the arbitrator the company contended (1.) that the claimant was not entitled to an indemnity in respect of a loss in fact occasioned by or in connection with a burglary if (*a*) the claimant failed to prove affirmatively that the answers made in the proposal were true, or (*b*) it was established that any of the answers in the proposal form were untrue; and (2.) that the company was entitled to rely on (*a*) or (*b*) as a defence to the claim.

The claimant contended (1.) that the question whether the

answers contained in the proposal were true or untrue was not a difference in the arbitration and that the arbitrator had no power to determine whether the answers were true or not or to determine any matters which called in question the validity of the policy; and (2.) that it was not necessary for the claimant to prove affirmatively that the answers in the proposal were true.

The questions for the opinion of the Court were: (1.) whether the truth or untruth of the answers in the proposal was a matter which had been referred to the arbitrator; and (2.) whether the claim necessarily failed unless the claimant proved affirmatively that the answers in the proposal were true.

Tebbs, for the claimant. The company cannot in this arbitration raise any question which goes to the validity of the policy, because if he succeeds in avoiding the policy he avoids the arbitration clause which is part of the policy: *Jureidini* v. *National British and Irish Millers Insurance Co.*, per Viscount Haldane L.C. (1); *Monro* v. *Bognor Urban Council*. (2)

Rigby Swift, K.C., and *Herbert Smith*, for the company. Where a defendant is sued upon a contract there is all the difference between the cases (1.) where he seeks to set aside the contract on account of matter dehors the contract and (2.) where he seeks to avoid liability by praying in aid one of the terms of the contract. In the first case it is true to say that he avoids the contract; in the second it is not true. The truth is that he affirms the contract. The clause making true answers the basis of the policy was considered in *Anderson* v. *Fitzgerald*. (3) It is a term of the policy that the truth of the answers forms the basis of the contract. When one side affirms and the other denies that a certain answer is true a difference has arisen out of the policy: *Gaw* v. *British Law Fire Insurance Co.* (4)

Secondly, the claimant must prove his claim. To do this he must prove that his answers were true.

Tebbs in reply upon the first point.

VISCOUNT READING C.J. The claimant was insured in a policy of insurance by the company against burglary. He claims to

(1) [1915] A. C. 499, 505.
(2) [1915] 3 K. B. 167.
(3) (1853) 4 H. L. C. 484.
(4) [1908] 1 I. R. 245.

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recover the value of property insured under his policy. The policy, which is the contract between the parties, recites that "a proposal and declaration with certain written statements and particulars" are "the basis of this contract." In the proposal form there is a clause containing a declaration by the claimant that the answers in this proposal are full and true, that he has withheld no information whatever that might tend in any way to increase the company's risk or influence their decision regarding the policy, and that the proposal and declaration shall be the basis of the contract between the parties.

It is asserted in answer to his claim that the declaration and answers are not true and that it must be taken that each statement in the declaration is material and that it induced the contract, for that is the meaning of being "the basis of the contract." There is also a condition in the policy that all difference arising out of this policy shall be referred to the decision of an arbitrator. An arbitrator was appointed under the policy to determine certain differences arising out of the policy. When the matter came before the arbitrator it was contended on behalf of the company that one or more of the answers were untrue. To this it was objected by the claimant that this was not a difference in the arbitration and that the arbitrator had no power to determine whether the answers were true or not, or to determine any matters which called in question the validity of the policy. The argument amounts to this, that, inasmuch as the company's contention, if well founded, would result in avoiding the policy, it could not be open to the arbitrator to entertain that contention, because unless the policy was valid, there was no reference to arbitration and only such questions as arise out of an admittedly valid policy could be referred to the arbitrator; and the real question in this case is whether the truth or untruth of an answer is a difference arising out of the policy. If the effect of the company's contention can be truly described as avoiding the policy there would be much force in the claimant's objection. But the phrase "avoiding the policy" is loosely used in reference to the circumstances of this case. In truth the company is relying upon a term of the policy which prevents the claimant recovering. If a statement is made which is material, which induced one of the

parties to enter into a contract, and which is untrue, the party so induced may repudiate the contract. The truth, the materiality, and the inducement are three questions, each of which would be for a jury, and two of them, the materiality and the inducement, are difficult questions. By the terms of this policy, in order to avoid all the difficulties which these two questions raise, the parties have agreed that the declaration with statements and particulars are the basis of the contract, and when the parties agreed to that it is no longer open to the claimant to deny the materiality of any one of those statements or its effect as an inducement to the company to enter into the contract. If the company were seeking to avoid the contract in the true sense they would have to rely upon some matter outside the contract, such as a misrepresentation of some material fact inducing the contract of which the force and effect are not declared by the contract itself. In that case the materiality of the fact and its effect in inducing the contract would have to be tried. In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but relying on its terms. In my opinion, therefore, the question whether or not the statement is true is a question arising out of the policy. The first question asked by the arbitrator must be answered in the affirmative, or in other words, the truth or untruth of the answers in the proposal is a matter which has been referred to the arbitrator.

The second question asked by the arbitrator is whether the applicant's claim to be indemnified in respect of a loss by burglary necessarily fails unless the applicant proves affirmatively that the answers in the proposal are true. To the question as stated the answer must be in the negative; but the arguments of counsel have defined the real point. The proposal form contains a question, Have you ever proposed for burglary insurance? The claimant has answered "No," and his answer is challenged by the company. He has been asked about another policy signed by him, and he has given an explanation. The arbitrator is in doubt

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whether the answer to the question is true, and he asks the Court on whom is the burden of proof; whether on the claimant to prove that the answer is true or on the company to prove that it is false. The burden of proof, in the first instance at all events, lies on that party against whom judgment should be given if no evidence were adduced upon the issue. Assuming in this case that a loss was established and the policy put in evidence, then the claimant would be entitled to recover. If he is met by the company with the objection that his answer to a question is not true they must establish that the answer is not true. If they fail to establish that, their objection fails. That is to say, the burden lies on the company to prove that the claimant's answer is untrue. Therefore the second question must be answered in the negative.

RIDLEY J. I am of the same opinion. As to the first question asked us, cases of this kind fall into two distinct classes. As an instance of the first class underwriters may say that a policy is void on the ground of fraud. The present case would fall within that class if the claimant were to allege a burglary and theft of his goods when in fact he had no goods. The result of proving that he had made such false statements would be to avoid the policy. It might be supposed that the same reasoning would apply to all cases where underwriters escape liability on account of false statements made by the assured. But there is a great distinction between the case I have just put and such a case as the present, where as a preliminary to the obligation to pay it is agreed that certain statements shall form the basis of the contract of insurance. In such a case when the company seeks to show that the statements are untrue, so that the contract itself gives them the right to say they are not liable, they do not avoid the contract; they set up a term in the contract absolving them from liability. In the first case they rely on matter which forms no part of the policy; they are disaffirming the contract and with it the arbitration clause. In the second case they rely on a clause in the policy relieving them from liability, and so they affirm the contract under which the arbitration takes place. The result is that the truth or untruth of the answers in the proposal is a matter which has been referred to the arbitrator.

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As to the second question I agree with what has been said by my Lord, and have nothing to add.

AVORY J. I agree.

Solicitor for claimant: *B. Webb.*
Solicitors for company: *Hair & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

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May 4, 7, 8, 9, 10, 21.

MACMILLAN AND ANOTHER *v.* LONDON JOINT STOCK BANK, LIMITED.

[1916 M. 1149]

Banker—Cheque—Alteration of Amount—Space for Amount in Words left Blank—Mandate of Customer—Negligence—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 9, *sub-s.* 2; *s.* 20.

The plaintiffs, a business firm, had in their service a confidential clerk whose integrity they had no reason to suspect. It was the clerk's duty to fill in cheques for signature. The clerk presented to one of the partners in the plaintiffs' firm for signature a cheque drawn in favour of the firm. There was no sum in words written on the cheque in the space provided for writing, and there were the figures "2.0.0" in the space intended for figures. The partner signed the cheque. The clerk subsequently added the words "one hundred and twenty pounds" in the space left for words and wrote the figures "1" and "0" respectively on each side of the figure "2." The clerk presented the cheque for payment at the defendant bank, with which the plaintiffs kept an account, and obtained payment of 120*l.* out of the plaintiffs' account:—

Held, that the mandate to the bank was to pay 2*l.* only; and that the signing of the cheque in the above circumstances did not constitute negligence such as to prevent the plaintiffs from recovering from the bank the amount paid, less the 2*l.*

A customer owes a duty to his banker not to mislead, but it is not broken by the customer drawing a cheque in such a manner as to afford another person an opportunity to commit a fraud and thus to mislead the banker.

Sect. 9, sub-s. 2, and s. 20 of the Bills of Exchange Act, 1882, as applicable to a cheque, discussed.

Young v. *Grote* (1827) 4 Bing. 253 commented on.

Judgment of Sankey J. [1917] 1 K. B. 363 affirmed.

APPEAL from the judgment of Sankey J. at the trial of the action without a jury; reported [1917] 1 K. B. 363.

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BANK,
LIMITED.

The action was brought to recover 235*l.*, which the plaintiffs (who carried on business in partnership and kept an account at the defendant bank) alleged had been paid by the defendant bank out of their account on thirteen forged cheques. In respect of twelve of the cheques for 117*l.* in all the learned judge gave judgment for the defendants, and no appeal was brought from this part of the judgment. The remaining cheque in respect of which the appeal was brought was, when presented to the bank for payment as hereinafter mentioned, on its face a cheque for 120*l.* This cheque was an open cheque payable to "ourselves or bearer."

The following statement of facts, taken from the judgment of Sankey J., was read by Swinfen Eady L.J. in his judgment :—

"'The plaintiffs had in their employment a confidential clerk of the name of Klantschi. He had been with them for some years and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. On the morning of February 9, 1915, one of the plaintiff partners, Mr. Arthur, was going out to lunch about midday. He had his hat on and was leaving the office when the clerk came up to him and said he wanted 2*l.* for petty cash and produced a cheque for signature. The clerk had repeatedly presented cheques for signature to get petty cash, but usually for 3*l.*, and Mr. Arthur asked him why it was not 3*l.* on this occasion. The clerk replied that 2*l.* would be sufficient. Mr. Arthur thereupon signed the cheque, which I shall discuss more in detail later on. On the next day the clerk did not come to business. Mr. Arthur took the opportunity to look through the clerk's books, and found matters which so excited his suspicion that he consulted his solicitor, and on February 11 both he and the solicitor went to the bank. They there found that the clerk had presented a cheque for 120*l.*, which had been paid to him. The clerk was a thief and absconded with the money. His books were subsequently examined, and in the result a number of discrepancies were found.

"'Upon June 30 the plaintiffs issued a writ against the defendants claiming 235*l.* which they alleged had been paid by the bank out of the plaintiffs' account on forged cheques. This sum divides itself into two parts. There are a number of cheques beginning July 19, 1913, and ending February 24, 1914, amounting to 117*l.*,

which stand in one position, and there is the cheque for 120*l.*, which stands in an entirely different position.'

"The learned judge then dealt with and disposed of the items amounting to 117*l.*; and he found the facts as to the 120*l.* cheque as follows:—

"'I now turn to the second part, and it becomes necessary to examine the cheque for 120*l.* minutely. Mr. Arthur says that when he signed the cheque there was written in the space where writing is provided for the words "two pounds" and in the space where figures are provided for "2.0.0." Afterwards, it is suggested, the clerk added the words "one hundred and" before the word "two" and converted the word "two" into the word "twenty," that he then placed the figure "1" before and the figure "0" after the figure "2," and in the result the cheque appeared to be a cheque filled up with the words "one hundred and twenty pounds" and in figures "£120.0.0." After listening to the plaintiffs' evidence and considering the cheque itself and the evidence given thereon by the defendants' expert witness, I am satisfied that this suggestion is wrong. I recollect that Mr. Arthur was in a great hurry when he signed the cheque, and I find the fact to be that when he signed it there were no words at all in the space left for words; that space was a blank. There were the figures "2.0.0." in the space left for figures. The clerk, having obtained Mr. Arthur's signature to the cheque in this condition properly dated and payable to "ourselves," added the words "one hundred and twenty pounds" in the space left for words and the figures "1" and "0" on either side of the figure "2."'"

Sankey J. held that the mandate to the bank was to pay 2*l.* only; that the plaintiffs were not guilty of any negligence which misled the bank, and that, if they were guilty of negligence, the negligence did not cause the loss. He accordingly gave judgment for the plaintiffs for 118*l.* The defendants appealed.

Roche, K.C., and *A. Neilson*, for the defendants. First, the plaintiffs by signing the cheque, which was an open cheque payable to bearer, with the space for the amount in words left blank, gave authority to Klantscih as "the person in possession of it" to fill it up as he did: s. 20, sub-s. 1, of the Bills of Exchange Act, 1882;

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and no private limitation of his authority, such as writing the figure "2" in the space left for figures, can affect the position of the bank, which acted upon the apparent mandate given by the plaintiffs to Klantschi. By s. 9, sub-s. 2, of the Bills of Exchange Act, 1882, where there is a discrepancy between the sum in words and the sum in figures, the sum denoted by the words is the amount payable. The sum in words, and not the sum in figures, is the material part of the cheque, and the absence of any sum in words brings the case within s. 20, sub-s. 1, s. 73 applying that section to a cheque. This cheque, when the sum in words was filled in, became a cheque for 120*l.*, which the bank was justified in paying: *Garrard* v. *Lewis*. (1) Apart from s. 20 the plaintiffs handed the cheque in blank to Klantschi with authority to him to fill it in and to obtain payment of it, and they cannot complain that the bank has paid it: *Lloyd's Bank* v. *Cooke* (2); *Smith* v. *Prosser* (3); *Union Credit Bank* v. *Mersey Docks and Harbour Board*. (4) Parke B. in *Robarts* v. *Tucker* (5) treated the decision in *Young* v. *Grote* (6) as being based on the principle that the customer had by signing a blank cheque given authority to any person in whose hands it was to fill it up in whatever way the blank permitted; and Bigham J. in *Union Credit Bank* v. *Mersey Docks and Harbour Board* (7) took the same view.

In the next place, the plaintiffs in the preparation and presentation of the mandate, that is, in signing and handing to their clerk an open cheque payable to bearer with the space for the amount in words left blank, and so drawn as to leave room for the figures "1" and "0" to be written respectively on either side of the "2," were guilty of such negligence as disentitled them from recovering from the bank the amount by which the actual mandate was exceeded: *Young* v. *Grote*. (6) A customer owes a duty to his banker in regard to the drawing of cheques. His duty is to take reasonable care to see that cheques are properly filled in when presented for payment so that the banker is not misled into paying a larger sum than that intended by the customer. The plaintiffs

(1) (1882) 10 Q. B. D. 30.
(2) [1907] 1 K. B. 794.
(3) [1907] 2 K. B. 735, 752.
(4) [1899] 2 Q. B. 205.
(5) (1851) 16 Q. B. 560, 579, 580.
(6) 4 Bing. 253.
(7) [1899] 2 Q. B. 211, 212.

did not take any precaution which a business man would have taken when signing the cheque with the blanks in it and handing it to a clerk to get it cashed. The plaintiffs were warned by a notice on the cover of the cheque-book to draw cheques so as to avoid occasion for fraud. The most cursory examination of their pass-book would have shown that Klantschi had for some time been defrauding them. The negligence was in or immediately connected with the transaction, and was the proximate cause of the loss. *Young* v. *Grote* (1), which covers the present case, was decided ninety years ago, and has been approved by the highest authorities. It was referred to by Parke B. in delivering judgment in the Exchequer Chamber in *Robarts* v. *Tucker* (2) without any expression of disapproval; by the same learned judge in delivering the opinion of the judges in *Bank of Ireland* v. *Trustees of Evans' Charities* (3), and by Lord Cranworth L.C. and Lord Brougham in the same case. (4) It was referred to with approval in *Ingham* v. *Primrose* (5) and by Erle C.J., Williams and Keating JJ. in *Ex parte Swan* (6), Williams J. saying that "its authority cannot be disputed." In *Swan* v. *North British Australasian Co.* Martin and Channell BB. in the Court of Exchequer (7) and Keating and Blackburn JJ. and Cockburn C.J. in the Exchequer Chamber (8) referred to it as an existing authority. In *Halifax Union* v. *Wheelwright* (9) the Court of Exchequer followed it in a case raising the same point; and in *Arnold* v. *Cheque Bank* (10) Lord Coleridge C.J., in delivering the judgment of the Court, said that *Young* v. *Grote* (1) "must be considered as well decided," and as "in entire accordance with the rule" expressed by Blackburn J. in *Swan* v. *North British Australasian Co.* (11) Down to this date whenever *Young* v. *Grote* (1) was referred to all the judges recognized it as an existing authority, though the ground of the decision was variously stated. In *Baxendale* v. *Bennett* (12) Bramwell L.J., in distinguishing *Young* v.

(1) 4 Bing. 253.
(2) 16 Q. B. 579.
(3) (1855) 5 H. L. C. 389, 410.
(4) Ibid. 413, 415.
(5) (1859) 7 C. B. (N.S.) 82, 87.
(6) (1859) 7 C. B. (N.S.) 400, 431, 440, 445.
(7) (1862) 7 H. & N. 603, 645, 660.
(8) (1863) 2 H. & C. 175, 179, 182, 189.
(9) (1875) L. R. 10 Ex. 183.
(10) (1876) 1 C. P. D. 578, 586, 588.
(11) 2 H. & C. 182.
(12) (1878) 3 Q. B. D. 525, 530.

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Grote (1), said that "the defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime." Brett L.J. (2) is the first judge to throw a doubt on the decision in *Young* v. *Grote* (1), saying that "the observations made by the House of Lords in *Bank of Ireland* v. *Trustees of Evans' Charities* (3) have shaken" that case. The principle of *Young* v. *Grote* (1) was, however, subsequently applied in *London and South Western Bank* v. *Wentworth* (4); and in *Mayor of the Staple of England* v. *Bank of England.* (5) Day and Wills JJ. referred to it with approval, and Lord Esher M.R. in the Court of Appeal (6) referred to it without expressing any dissent. In *Bank of England* v. *Vagliano* (7) Lord Bramwell referred to it as an existing authority, and Lord Field adopted the view of the Court in *Arnold* v. *Cheque Bank.* (8) That case and others show that the committal of a fraud does not of itself prevent the negligence being the proximate cause of the loss. In *Scholfield* v. *Earl of Londesborough* (9) in the Court of Appeal Lord Esher referred to *Young* v. *Grote* (1) as "the fount of bad argument," and Rigby L.J. seemed to refer to it with doubt (10), whereas Lopes L.J. said (11) that it was a binding authority, and referred to the judgment of Bovill C.J. in *Société Générale* v. *Metropolitan Bank.* (12) In the House of Lords (13), however, Lord Halsbury L.C., in discussing *Young* v. *Grote* (1), seemed to doubt that decision, but said (14) that it would be an intelligible ground to put it on that the cheque when filled in by the plaintiff's wife became his genuine order; Lord Watson (15) said that if that case "was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up," it had no bearing on the case under discussion; and if, on the other hand, the decision was based upon the ratio that the customer "had failed in the duty which he owed to his banker by giving facilities for its fraudulent altera-

(1) 4 Bing. 253.
(2) 3 Q. B. D. 533, 534.
(3) 5 H. L. C. 389.
(4) (1880) 5 Ex. D. 96.
(5) (1887) 21 Q. B. D. 160, 163, 167.
(6) Ibid. 172.
(7) [1891] A. C. 107, 136, 170.
(8) 1 C. P. D. 586.
(9) [1895] 1 Q. B. 536, 543.
(10) Ibid. 555, 556.
(11) Ibid. 550.
(12) (1873) 27 L. T. 849, 856.
(13) [1896] A. C. 514.
(14) Ibid. 523.
(15) Ibid. 536, 537.

tion, I am not prepared to affirm that it cannot be supported by authority." Lords Macnaghten, Morris, Shand, and Davey all treated *Young* v. *Grote* (1) as a binding authority. In *Kepitigalla Rubber Estates* v. *National Bank of India* (2) Bray J. approved of *Young* v. *Grote* (1) and said that it was the duty of a customer to use reasonable care in issuing mandates to his banker; and Byles on Bills, 17th ed., p. 30, treats the authority of *Young* v. *Grote* (1) as unimpaired. The observation of Vaughan Williams L.J. in *Smith* v. *Prosser* (3), that *Young* v. *Grote* (1) had "now ceased to be law," was obiter, and *Young* v. *Grote* (1) was not cited in argument and was therefore not discussed. The case of *Imperial Bank of Canada* v. *Bank of Hamilton* (4) does not affect *Young* v. *Grote*. (1) *Colonial Bank of Australasia* v. *Marshall* (5), the case of a fraudulently altered cheque, was decided upon the authority of *Scholfield* v. *Earl of Londesborough* (6), which was a decision as to the acceptor of a bill of exchange, and the Privy Council wrongly applied the decision to the case of banker and customer. The plaintiffs in the present case by their negligence in signing the cheque with the space for the amount in words blank gave Klantschi the opportunity to commit a fraud and thus to mislead the bank. The plaintiffs therefore cannot recover. [*Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (7); Paget on Banking, 2nd ed., p. 192; and Beven on Negligence, 3rd ed., pp. 1317 et seq., were also referred to.]

Holman Gregory, K.C., and *Jowitt*, for the plaintiffs. Upon the facts as found by the learned judge the judgment was right. It may be admitted that there is a duty owed by a customer to his banker arising out of the contractual relation between them. In *Scholfield* v. *Earl of Londesborough* (6) some duty is recognized as existing. The extent of that duty has nowhere been defined. There must, however, be some direct representation, whether by conduct or otherwise, to the bank by the customer which causes the bank to pay the cheque; the negligent act relied upon must directly cause the loss. In *Adelphi Bank* v. *Edwards* (8) Lindley L.J.

(1) 4 Bing. 253.
(2) [1909] 2 K. B. 1010.
(3) [1907] 2 K. B. 746.
(4) [1903] A. C. 49.
(5) [1906] A. C. 559.
(6) [1896] A. C. 514.
(7) (1906) 11 Com. Cas. 255.
(8) Not reported; referred to in *Scholfield* v. *Earl of Londesborough* [1896] A. C. 532, 541.

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said: "We cannot say there was negligence here, unless we go the whole length of saying that it is negligence to sign a negotiable instrument so that somebody else can tamper with it. I cannot go that length. I think it would be wrong." That passage was approved by Lord Halsbury L.C. and Lord Watson in *Scholfield* v. *Earl of Londesborough*. (1) The dictum of Lord Watson in that case (2), which is relied upon by the defendants, that if "the decision in *Young* v. *Grote* (3) was based upon the ratio that the customer, in filling up the cheque through his wife . . . . had failed in the duty which he owed to his banker by giving facilities for its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority," is wrong and is contrary to the authorities. The dictum of Bovill C.J. in *Société Générale* v. *Metropolitan Bank* (4), that parties "must use reasonable care not to afford opportunities for" forgery, is not supported by any authority. The negligence must be in the transaction and must be the proximate cause of the loss. The intervention of a crime cuts the nexus between the act and the loss. As Parke B. said in delivering the opinion of the judges in *Bank of Ireland* v. *Trustees of Evans' Charities* (5), negligence which enables a forgery to be committed is not sufficient; the negligence "must be in or immediately connected with the transfer itself." See also *Arnold* v. *Cheque Bank* (6); *Baxendale* v. *Bennett* (7); *Mayor of the Staple of England* v. *Bank of England*. (8) The point raised in the present case was decided in *Colonial Bank of Australasia* v. *Marshall* (9), and it was laid down by the Privy Council that "whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation." The act of the customer must convey to the bank the information that the cheque is the customer's mandate. Nor must the customer by his writing on the cheque itself mislead the bank. There is no duty to provide against a

(1) [1896] A. C. 532, 541.
(2) Ibid. 536.
(3) 4 Bing. 253.
(4) 27 L. T. 856.
(5) 5 H. L. C. 409, 410.
(6) 1 C. P. D. 587, 588.
(7) 3 Q. B. D. 530.
(8) 21 Q. B. D. 176.
(9) [1906] A. C. 559, 568.

crime. The effect of the decision in *Scholfield* v. *Earl of Londesborough* (1) upon *Young* v. *Grote* (2) is correctly stated in *Colonial Bank of Australasia* v. *Marshall* (3), and it cannot be said that *Young* v. *Grote* (2) is now an authority. In *Halifax Union* v. *Wheelwright* (4) the decision turned upon the special finding of the arbitrator that the bank was misled by want of proper caution on the part of the guardians. The judgment of Sankey J., that the mandate to the bank was to pay 2*l.*, is correct.

With reference to s. 20 of the Bills of Exchange Act, 1882, until a cheque is negotiated the provisions of the Act as to negotiable instruments do not apply to it. Until then it is a mere mandate to the bank. At any rate, s. 20 does not give any one authority to alter a cheque. No one had any authority to alter the figure " 2 " to " 120 " and to write in corresponding words. It is not suggested by the bank that, if 120*l.* had been written in words and the figure " 2 " left unaltered, the bank would have under s. 9, sub-s. 2, paid the 120*l.* and disregarded the figure.

Roche, K.C., in reply.

Cur. adv. vult.

May 21. SWINFEN EADY L.J. read the following judgment:—The plaintiffs kept a banking account with the defendants. This action was brought to recover 235*l.*, being the amount alleged to have been paid by the defendants in excess of the amounts for which thirteen cheques were drawn, by reason of the cheques having been fraudulently altered and the amounts increased before presentation. In respect of twelve cheques, alleged to have been fraudulently increased to the extent of 117*l.*, the judge gave judgment for the defendants, and there is no appeal from that part of the judgment. With regard to the remaining cheque dated February 9, 1915, alleged to have been drawn for 2*l.* only, and fraudulently increased to 120*l.*, and in respect of which the defendants paid 120*l.*, the judge gave judgment for the plaintiffs for the amount of the excess, namely, 118*l.*, and the defendants appeal from that judgment.

The case was tried by Sankey J. without a jury, and he found the facts as follows: I take these facts from the report of the case

(1) [1896] A. C. 514.
(2) 4 Bing. 253.
(3) [1906] A. C. 559.
(4) L. R. 10 Ex. 191.

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in the *Law Reports*. (1) [The Lord Justice read the passages from the judgment of Sankey J. set out above.]

I take the facts as found by the judge. His findings were not challenged by either side.

The appellants contend that upon the facts as found they are entitled to judgment, and they put forward two contentions. First, they contend that the plaintiffs entrusted their clerk with the duty of filling up the cheque, after signature, so far as it was left blank, and that they are responsible for whatever amount he inserted, and that the private limit of the clerk's authority does not affect them. In this connection they rely on s. 20 and s. 9, sub-s. 2, of the Bills of Exchange Act, 1882. Assuming that the clerk had prima facie authority to fill up the words in the space left blank this may be rebutted, and it is clear from the evidence that he had no actual authority to do so, and that the blank was not filled up in accordance with any authority given. The bank are not within the terms of the proviso contained in s. 20, which only applies where the "instrument after completion is negotiated to a holder in due course." Moreover, if the cheque had been filled up in words for one hundred and twenty pounds, and the figures of £2.0.0 had remained unaltered, the bank would in my opinion have been justified in refusing to pay the larger sum, and paying only the smaller sum. This is, according to the text-writers, the practice followed by bankers in England in respect of cheques, where there is a discrepancy between words and figures, namely, to treat the smaller sum only as the sum payable. Sect. 9, sub-s. 2, has no application to the present case, as when the cheque was presented for payment there was no discrepancy between the words and figures, the figures having then been improperly altered to agree with the words which had been added after signature. The appellants further said that, whether s. 20 applied or not, they were within and protected by the principle expressed by Fletcher Moulton L.J. in *Smith* v. *Prosser* (2), where he said: "The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument." The defendants,

(1) [1917] 1 K. B. 364, 365. (2) [1907] 2 K. B. 752.

however, fail upon the facts to bring themselves within this rule, as when the cheque was signed by the plaintiffs there was a limit obvious on the face of the instrument, as the figures had been filled in limiting the cheque to £2.0.0. These figures formed a material part of the cheque. In this respect the present case is unlike *Garrard* v. *Lewis* (1), where it was held that the figures in the margin of the acceptance, which had been fraudulently altered, were not an essential part of a bill of exchange, and that the holder had a right to neglect the marginal figure and to look only to the body of the bill.

The appellants next contend that in the preparation and presentation of the cheque the plaintiffs were guilty of such negligence as disentitles them to recover; and they say that entrusting a person with an open bearer cheque, where the space for words was left blank and the space left between the figures was such that additional figures could be added, was a breach of the duty which a customer owes to his banker, and they relied upon the decision in *Young* v. *Grote* (2) and subsequent cases. Upon this point it is necessary to consider whether the facts establish such negligence as prevents the plaintiffs from recovering. The appellants in relying upon *Young* v. *Grote* (2) urged that during the ninety years which have elapsed since that judgment was given it had never been overruled, but frequently approved; that it was approved in the Exchequer Chamber in *Swan* v. *North British Australasian Co.* (3); that Lord Coleridge C.J., in delivering the judgment of the Common Pleas Division in *Arnold* v. *Cheque Bank* (4) (consisting of Archibald and Lindley JJ. and himself), said: "That case, no doubt, must be considered as well decided"; that it was treated in the House of Lords in *Bank of England* v. *Vagliano* (5) by Lord Bramwell as an authority; it was commented upon in detail by the House of Lords in *Scholfield* v. *Earl of Londesborough* (6), Lord Macnaghten (7) referring to it as a case which has excited as much diversity of opinion as any case in the books, having given rise to various explanations not altogether uniform

(1) 10 Q. B. D. 34.
(2) 4 Bing. 253.
(3) 2 H. & C. 175.
(4) 1 C. P. D. 586.
(5) [1891] A. C. 136.
(6) [1896] A. C. 514.
(7) Ibid. 544.

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or consistent, that circumstance of itself being regarded by some judges as a badge of merit and a passport to the confidence of the profession. He then proceeds to inquire what, after all, is the true principle of *Young* v. *Grote*. (1) He examines various reported explanations, one of which he seems inclined to prefer, and himself expressed no disapproval of the decision. The appellants urged that *Young* v. *Grote* (1) was under these circumstances a binding authority and governed the present case.

The defence of the bank is founded on a breach of the duty which a customer owes to his banker. It has been laid down that such a duty exists, although the extent of it has not been defined. In *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (2) Kennedy J. said: "I think that the relation of bankers and customers does involve a duty on the part of the customer"; but he did not define the extent of that duty. In *Colonial Bank of Australasia* v. *Marshall* (3) the judgment of the Board (consisting of the Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, and Sir Alfred Wills) was delivered by Sir Arthur Wilson. Referring to the decision of the House of Lords in *Scholfield* v. *Earl of Londesborough* (4), Sir Arthur Wilson said (5): "The decision does not directly affect the present case, for the contractual relation existing between a banker and his customer differentiates their case from that of the acceptor and the holder of a bill, and this was pointed out by several of their Lordships. It was recognized that there is or may be a duty on the part of the drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards the holder. It was recognized that 'if . . . . the customer by any act of his has induced the banker to act upon the document by his act, or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled.' (6) No attempt was made to define the extent of such obligation; it was unnecessary to do so in that case, nor do their Lordships propose now to attempt any abstract definition of such

(1) 4 Bing. 253.
(2) 11 Com. Cas. 255, 266.
(3) [1906] A. C. 559.
(4) [1896] A. C. 514.
(5) [1906] A. C. 567.
(6) [1896] A. C. 523.

duty. Indeed, it would be impossible to do so, seeing that the extent of the duty may depend upon an agreed or established course of dealing between the parties." Then a little later on on the same page he continued: "The Lord Chancellor (1) expressed his concurrence in the opinion of Lindley L.J. (2), 'that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of Bovill C.J. in a former case, *Société Générale* v. *Metropolitan Bank* (3), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land.' Lord Watson (4) approved the same rulings. Lord Macnaghten (5) expressed the same opinion, and Lord Davey concurred in the judgment of Lord Watson. The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation. Their Lordships therefore agree with the High Court of Australia in holding that there was no evidence proper to be left to the jury of negligence on the part of the respondents."

It must now be treated as settled that the mere fact that a cheque is so drawn that spaces left in it can be utilized for forgery is not by itself any violation of the duty which a customer owes to his banker, or any evidence of negligence to go to a jury. Nor, in my opinion, does the fact that the space for words in the cheque has been left blank by the drawer make any difference. It is certainly the duty of a customer not to mislead the banker, and if he does so on a material point, however innocently, and although himself deceived by the fraud committed, he and not the bank ought to bear the loss which has been the consequence: per Earl of Selborne in *Bank of England* v. *Vagliano*. (6) That case affords an illustration of a customer innocently misleading a banker and

(1) [1896] A. C. 532.
(2) In *Adelphi Bank* v. *Edwards*, not reported.
(3) 27 L. T. 856.
(4) [1896] A. C. 540.
(5) Ibid. 544.
(6) [1891] A. C. 123.

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having to suffer for it. Cases may arise where a customer has written so badly that the banker has justifiably read a cheque as authorizing a payment of a larger sum than the customer intended his figures to represent. *Ireland* v. *Livingston* (1) is an authority for saying that the customer must bear the loss arising from his own indistinctness of expression. There may also be cases in which a customer knows of circumstances which may and probably will lead to the banker honouring cheques not duly drawn, and fails to give the banker a proper notice or warning in the matter. A customer may probably mislead a banker as well by omission as by commission. Beyond this no authority has yet gone. In *Young* v. *Grote* (2) and in *Halifax Union* v. *Wheelwright* (3) the judgment of the Court was pronounced on facts found by an arbitrator. In the former case the arbitrator expressly found that the customer was guilty of negligence. In the latter case Cleasby B., in delivering the judgment of the Court, said (4) that the statement in the special case was as follows: "I find that the payment by the treasurer's clerks of the excess in these instances was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk, in signing the orders fraudulently prepared by Laidler for their signature." This case therefore proceeded on the ground that the arbitrator found that the customer had misled the banker. Cleasby B. stated the principle to be (5) that a man cannot take advantage of his own wrong (i.e., breach of a legal duty), a man cannot complain of the consequence of his own default, against a person who was misled by that default without any fault of his own. Whether the facts in these two cases were such as to justify the finding of the arbitrator was not a question before the Court.

A customer owes a duty to his banker not to mislead, but such duty is not broken by negligently drawing a cheque in such a manner as affords another person an opportunity to mislead. Negligence in order to estop must be negligence in the transaction itself: see per Blackburn J. in *Swan* v. *North British Australasian Co.* (6) In *Bank of Ireland* v. *Trustees of Evans' Charities* (7) it was expressly

(1) (1872) L. R. 5 H. L. 395.
(2) 4 Bing. 253.
(3) L. R. 10 Ex. 183.
(4) Ibid. 191.
(5) Ibid. 192.
(6) 2 H. & C. 182.
(7) 5 H. L. C. 389.

held both that the negligence in order to operate as an estoppel must be negligence "in or immediately connected with the transfer itself," and further that it must also be "the proximate cause of the loss." That is not the case where there is a new subsequent cause intervening which itself occasions the loss. Again, in *Mayor of the Staple of England* v. *Bank of England* (1), where the jury had found that the plaintiffs were guilty of negligence so as to induce the defendants to act on the powers of attorney to transfer, it was held in the Court of Appeal by Lord Esher M.R., not that there was no evidence of negligence, but that there was no case to go to the jury upon the question whether there was negligence which would excuse the defendants, because that negligence, if it existed, was not the proximate cause of what the bank did, namely, transferring the stock. (2) Bowen L.J. said (3) that if there was negligence of the plaintiff company it was not the proximate cause of the transfer; it was not the direct and immediate consequence of that carelessness that Drew would commit the forgery he committed in the power of attorney, and that the bank would be induced by that to transfer the stock. He held that the proximate cause of the transfer was the felony of Drew, and that the felony was not the natural or likely or necessary or direct consequence of the carelessness of the plaintiffs.

Similarly, in the present case it was not the mode in which the cheque was drawn which was the proximate or effective cause of the bank paying a larger sum than the cheque was originally drawn for. It was the subsequent fraud of the clerk Klantschi, which was not the natural or necessary or likely consequence of any carelessness on the part of the plaintiffs, and which the plaintiffs had no reason whatever to anticipate. Klantschi had been their trusted clerk and cashier for two years, and the plaintiffs had no cause whatever to suspect his perfect honesty. Entrusting such a person with a cheque, even though carelessly drawn, to take directly to the bank to encash it there, was not negligence misleading the bank and estopping the plaintiffs from recovering the excess. The learned judge below came to the conclusion (*a*) that the plaintiffs were not guilty of any negligence which misled the

(1) 21 Q. B. D. 160. (2) Ibid. 173.
(3) Ibid. 176.

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bank, and (*b*) that if they were guilty of any negligence it was not negligence which caused the loss. I agree with these conclusions.

In my opinion the judgment of Sankey J. was correct and was put upon the right ground, and this appeal fails.

SCRUTTON L.J. read the following judgment :—The London Joint Stock Bank, Limited, whom I will call "the bank," appeal against a judgment of Sankey J. in favour of Macmillan and Arthur, whom I will call "the customer," for 118*l.*, being the amount by which a cheque of 120*l.*, as forged and debited by the bank to the customer's account, exceeds the genuine cheque of the customer for 2*l.* At the trial each side took different views of the facts proved. As found by the judge the facts agree with neither side's contention, and are as follows: A clerk of the customer, who kept the petty cash, brought a cheque for petty cash to a partner to sign saying that he wanted 2*l.* for petty cash. The partner signed, and left the space for words blank for the clerk to fill in with "Two Pounds," the figures "£2.0.0" being in the space for figures. The clerk, however, filled the line for words with "One Hundred and Twenty Pounds," and added to the figures so as to make them read "£120.0.0." He cashed the cheque and absconded. It was then found he had been committing thefts and forgeries for some time, and a careful examination of the erasures and wrong additions in the pass-book would have discovered this before. It will be seen that this is not a case of forgery of a signature, or of a cheque with a genuine signature, after it had been issued as complete by the drawer, by forged additions in spaces which the method of drawing had left. It is a case where a drawer has left a subordinate to fill up part of a cheque which he has signed and present the completed cheque, while inserting in the cheque as signed an indication or limitation in figures of the amount for which words are to be filled in.

As the appeal as argued involved a minute investigation of the present authority of *Young* v. *Grote* (1) and the exact principles on which it was decided, it is well at once to state for comparison the exact facts of *Young* v. *Grote*. (1) Mr. Young left with his wife a blank cheque signed by himself with authority to fill it up

(1) 4 Bing. 253.

for wages. Mrs. Young directed a clerk to fill it up for fifty pounds two shillings and threepence, and the clerk did so and brought it to her. She approved it and told him to cash it; but he had intentionally so drawn it as to leave room for additions before the words and the figures, and after she had told him to cash the cheque as then drawn and complete he altered the cheque by addition so as to make it a cheque for 350*l.* 2*s.* 3*d.* and cashed it as such. It will be seen that this is not the case of fraud in filling up a cheque signed in blank and filled up by the person authorized to fill it up in a way contrary to oral instructions. It is the case of a cheque signed in blank and filled up within her authority by the wife who was authorized so to do, but subsequently fraudulently altered after it had been issued as a complete cheque.

Mr. Roche, who argued the case for the bank, put his case on two grounds. He contended, first, that the customer had entrusted the clerk with the filling up of a cheque and was responsible for the amount inserted though contrary to his private instructions. The principles on which this part of the case should be dealt with are, in my opinion, to be found in the two Court of Appeal decisions of *Lloyd's Bank* v. *Cooke* (1) and *Smith* v. *Prosser*. (2) In *Lloyd's Bank* v. *Cooke* (1) a man, who had given his signature on a blank stamped piece of paper to another with authority to fill it up for a limited amount, was held liable to a holder for value without notice on the note as fraudulently filled up by his agent to the limit of the stamp. This liability was put by the Court on estoppel at common law. On the other hand, in *Smith* v. *Prosser* (2) a man who had given his agent his signature on a blank piece of paper to be retained till he gave instructions to issue it as a promissory note, when the agent was to fill it up, was held not liable to a holder for value without notice on the note as fraudulently filled up and issued by his agent. The ground of this decision was that the principal had given no authority to issue, and therefore was not estopped from denying the form of the issue. To the bank this distinction cannot be very satisfactory, as it would be impossible to tell the difference between two such cheques on presentation, but the two cases make it clear that the actual authority given by the man who has signed his name to a blank form may be inquired

(1) [1907] 1 K. B. 794. (2) [1907] 2 K. B. 735.

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into. But in *Smith* v. *Prosser* (1) Fletcher Moulton L.J. lays down a principle which is intelligible and directly applicable to the present case. He says: "The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument." This appears to be the principle on which Sankey J. decided this part of the case, and I agree with it. If a man causes to be issued a negotiable instrument by leaving his agent to fill an essential part of it, he may limit his liability by inserting on the face of and in an essential part of the instrument a limitation of authority, and he is not bound to assume that his agent will fraudulently efface or alter that limitation. I put the case in argument of a cheque signed on a form stamped "Not over 10*l*." with the amount left to be filled in by the agent. Here the drawer would on the face of the instrument have given notice of a limitation of authority. But where the signer authorizes the issue of a document which his agent is to fill up, which on its face contains no limitation of authority, he must be answerable for the acts of his agent in the course of his employment. I am not at all convinced that estoppel is the proper ground of this liability, as I do not see what representation by statement or conduct the principal makes to the person to whom the cheque actually comes, once it is agreed that the mere signature is not such a representation, and I am disposed to think that the ground given by Lord Selborne for the rule in *France* v. *Clark* (2), where he states it to be a rule of the law merchant applicable to negotiable instruments, is the correct one. Lord Selborne, I think, anticipates Fletcher Moulton L.J.'s principle by stating that the principal is bound by alterations "not ex facie fraudulent."

Though s. 20 of the Bills of Exchange Act applies to cheques, it does not, in my opinion, affect this case, for the authority to fill up is only "prima facie" and may therefore be disproved, unless the instrument is negotiated to a holder in due course, which does not cover presentation to and payment by the drawer's banker.

Three authorities require some consideration on this point. In

(1) [1907] 2 K. B. 752. (2) (1884) 26 Ch. D. 257, 262.

Garrard v. *Lewis* (1), where the signer of a blank acceptance had left in the margin a figure of 14*l.*, which was fraudulently altered to 164*l.*, Bowen J. held the acceptor liable. But the learned judge points out that marginal figures in a bill of exchange are no essential part of a bill, and this may be enough to distinguish the case from the present, where figures are an essential part of a cheque as commonly used. For, though by s. 9 of the Bills of Exchange Act in a bill words prevail over figures, it is the well-known practice of bankers in case of discrepancy of figures and words on cheques either to pay the smaller amount or refer to drawer (Hart on Banking, 3rd ed., p. 306); and if there is any discrepancy between this judgment and the principles of *Smith* v. *Prosser* (2) I prefer to follow the decision of the Court of Appeal.

The exact facts of the present case, however, appear applied to a delivery order in the decision of Bigham J. in the first case of *Union Credit Bank* v. *Mersey Docks and Harbour Board.* (3) There a delivery order had two columns, one for the designating number of the packages, the other for quantity. A goods owner inserted in the first column "246," the number of a hogshead, left the second column to be filled up, being told by one Nicholls it was not certain whether No. 246 was a tierce or a hogshead, and signed it. Nicholls then fraudulently filled in "263" and "Eighteen hogsheads," making the delivery order one for eighteen hogsheads. Here there was a document signed in blank, but on the face of it limited to one package. Bigham J. treated the goods owner as bound by estoppel, the goods owner being estopped from showing the actual authority he gave to Nicholls. This is contrary to the decision in *Smith* v. *Prosser.* (2) Bigham J. rested his decision on *Young* v. *Grote.* (4) He, however, treated the ground on which all four members of the Court decided *Young* v. *Grote* (4), namely, neglect of the duty owed by a customer to his banker, as erroneous, and said that the true ground was that taken by Park J., that the cheque was the genuine order of Young because he had authorized his wife to fill it up, and when she had filled it up it became his genuine order. On this it is to be remarked that though Bigham J. called this estoppel by representation Park J. did not, and while

(1) 10 Q. B. D. 30.
(2) [1907] 2 K. B. 735.
(3) [1899] 2 Q. B. 205.
(4) 4 Bing. 253.

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some learned judges have treated the ground as estoppel (Lord Cranworth in *Bank of Ireland* v. *Trustees of Evans' Charities* (1); Lord Field in *Vagliano's Case* (2)), others have strongly objected to this view (Cockburn C.J. in *Swan* v. *North British Australasian Co.* (3)). But the fatal objection to the view is that *Young* v. *Grote* (4) cannot be an authority for such a position, for the facts did not constitute a ground for it. Young gave authority to his wife and she filled up the cheque and issued it complete. For that cheque so filled up there was no dispute that Young was liable. The wife may be eliminated and the cheque so issued treated as Young's. What was in dispute was whether a subsequent addition to a cheque already complete bound Young, and with that position the question of filling up blank cheques had nothing to do. In my view the decision of Bigham J. in the first case of *Union Credit Bank* v. *Mersey Docks and Harbour Board* (5) was erroneous, and whatever else may be said for *Young* v. *Grote* (4) it cannot be supported as a decision on the effect of giving blank cheques.

On these grounds I am of opinion that Mr. Roche's first contention fails, the signer in blank having limited the authority given on the face of the cheque and being allowed to prove such limitation.

Mr. Roche's second ground was that in the preparation and presentation of the mandate to the banker the customer showed such want of care that he could not recover; and the negligence was said to be allowing a man in the position of Klantschi to fill up and present the cheque. On this head a large number of cases were cited to us which also bore on the question, which is excluded by the judge's findings of fact, whether the customer would be liable for fraudulent additions to a cheque rendered possible by the way in which the customer had drawn the cheque. Except as to the present position of *Young* v. *Grote* (4), I do not propose to refer to these authorities, which I have carefully considered, but only to state the conclusions to which I have come. Apart from any special course of business:—(1.) There is a duty owing from customer to banker, whether as from principal to agent, or from

(1) 5 H. L. C. 413, 414.
(2) [1891] A. C. 170, 171.
(3) 2 H. & C. 189.
(4) 4 Bing. 253.
(5) [1899] 2 Q. B. 205.

person giving to person receiving and acting on a mandate. (2.) The duty is to give clear and unambiguous instructions, and not by conduct outside the document of instructions to mislead the agent. For instance, if the customer writes so badly that two readings are reasonably possible he will be bound by a bona fide though erroneous interpretation of his mandate by the bank. This is merely an application of the well-known principle of *Ireland* v. *Livingston.* (1) Or if he is induced by fraud to send a separate genuine advice that a bill in fact a forgery will be presented for payment, as in *Vagliano's Case* (2), he may be liable either for breach of this duty or on estoppel by representation. (3.) But the duty does not extend to so acting as to give no opportunity for forgery or fraud by others. The fact that the customer's conduct has enabled a fraud to be committed by another, unless it gives rise to estoppel by statement or conduct amounting to statement, imposes no liability for damages for the fraud. It has been suggested that such a liability may arise on several grounds. It has been said to be an application of the statement of Ashhurst J. in *Lickbarrow* v. *Mason* (3), "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." But the searching criticism which this maxim received in the House of Lords in *Farquharson Brothers & Co.* v. *King & Co.* (4) shows that it cannot be applied against the man who puts a servant or agent in a position where he has an opportunity to cheat. "Enabling" has not this meaning. As Lord Lindley says (5), the maxim has never been judicially applied where nothing has been done by one of the innocent parties which has in fact misled the other. The result has sometimes been said to follow from "estoppel by negligence." I do not understand what is meant by this phrase unless it gives rise to some statement or conduct by the customer which in fact misleads the bank. I think the effect of the authorities is that if A. owing a duty to B. by the neglect of that duty induces B. to believe that a certain state of facts exists, he is estopped as against B. from denying that such a state of facts exists. But the neglect

(1) L. R. 5 H. L. 395.
(2) [1891] A. C. 107.
(3) (1787) 2 T. R. 63, 70.
(4) [1902] A. C. 325.
(5) Ibid. 342.

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must be in the transaction itself, not in previous history. Careless failure to find out previous forgeries, unaccompanied by any statement that they are genuine, so as to amount to holding out, gives rise to no estoppel. And the neglect must be the proximate cause of leading B. to his belief. Neglect of precautions by A. which enable C. to commit a crime causing loss to B. can never, in my view, give rise to a claim by B. against A., for the loss is not the proximate or even natural consequence of the neglect.

Applying these principles to the facts of this case, the failure to find out that Klantschi was a rogue and the drawing of a cheque in a way which gave him an opportunity of committing another forgery do not, in my opinion, give rise to any cause of action by the bank against the customer. The bank's loss is not the result of any representation by the customer, or of any carelessness by the customer, which caused the forgery, as distinguished from acts or omissions enabling it to be committed : see per Kennedy J. in *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (1)

It only remains to consider the applicability of *Young* v. *Grote* (2) to this branch of the argument. No case has been the subject of more struggles to explain it, or more different justifications of its authority. A common formula has been "that it does not apply to the case before the Court, but may be supported on a ground which does not affect our present decision." That is indeed the only common feature in the grounds assigned, that they shall not affect the case then before the Court, for such ground so assigned, when in another case it does affect the case before the Court, is rejected by the judges deciding that case. As far as I can trace, *Young* v. *Grote* (2) has only been directly applied in three cases. *Young* v. *Grote* (2) itself arose on the finding of an arbitrator that the customer had been guilty of negligence in so drawing the cheque as to give opportunity for forgery, and that partly by his negligence he had caused the bankers to pay the sum inserted by forgery. On such a finding the customer enabled, but did not cause, a forgery, and the forgery and consequent loss were not the proximate result of the customer's act. I agree with the statement of Lindley L.J. in *Adelphi Bank* v. *Edwards* (3), approved by Lord Halsbury in

(1) 11 Com. Cas. 267.
(2) 4 Bing. 253.
(3) Not reported.

Scholfield v. *Earl of Londesborough* (1), that it is wrong to say it is negligence to sign a negotiable instrument so that some one else can tamper with it. In *Ingham* v. *Primrose* (2) *Young* v. *Grote* (3) was applied by the Common Pleas in banc to hold liable a man who had signed a negotiable instrument and then torn it up because some one pasted the pieces together and presented them. I do not think such a decision on similar facts could be given at the present day. In *Halifax Union* v. *Wheelwright* (4), decided by the Court of Exchequer in banc, where again an arbitrator found that the defendant's payment of cheques was due solely to his being misled by want of proper caution in the plaintiffs' signing cheques so prepared that they gave opportunities for subsequent forgery, a decision in the defendant's favour was rested on *Young* v. *Grote*. (3) This again was a cause of enabling, not of causing, forgery, and can, I think, no longer be regarded as an authority. Lastly, in *Union Credit Bank* v. *Mersey Docks and Harbour Board* (5) Bigham J. in the first case held that the ground on which all the four judges in *Young* v. *Grote* (3) decided it, carelessness of the customer causing the loss, was erroneous, but that the ground on which one judge decided it, authority given to fill up a blank, which I have shown did not arise on the facts, was correct and should be followed. In the second case, where an addition was made to a document already filled up, he declined to follow *Young* v. *Grote* (3), if rested on carelessness of the customer. I think this exhausts the cases where *Young* v. *Grote* (3) has been approved and followed as applicable to the case before the Court. I do not think it necessary to go through the cases where it has been held inapplicable to the facts before the Court, but possibly to be supported on some ground not applicable to the Court's decision, especially as for every hypothetical approval of such a ground it is possible to produce an equally strong judicial disapproval of the ground in question.

In my view the result of the authorities is that *Young* v. *Grote* (3) can no longer be treated as an authority either (1.) on the position of those signing cheques in blank, which the facts did not raise,

(1) [1896] A. C. 532.
(2) 7 C. B. (N.S.) 82.
(3) 4 Bing. 253.
(4) L. R. 10 Ex. 183.
(5) [1899] 2 Q. B. 205.

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or (2.) on the position of those who by previous conduct or omissions, or by conduct or omissions directly connected with the cheque in question, give an opportunity to some one else to commit a forgery.

I might have contented myself with saying that I entirely approve and agree with the judgment of Sankey J., but in view of the strenuous and exhaustive argument addressed to us, which suggests that this case may afford the opportunity of either reviving the credit of *Young* v. *Grote* (1) in a higher tribunal or, as I think should be its fate, finally burying it, I have thought it right to express my opinion in my own words.

In my opinion the appeal should be dismissed with costs.

BRAY J. read the following judgment:—This is an appeal from a considered judgment of Sankey J. reported in [1917] 1 K. B. 363. The facts are there fully stated, and I need not, therefore, repeat them. There was only one disputed fact, namely, what was the condition of the cheque when Mr. Arthur signed it and handed it to Klantschi. The learned judge found that the line in which the amount of the cheque has to be written in words was entirely blank, but that in the space below for inserting the amount in figures there was written in figures the figure " 2 " for pounds and " 0.0 " in the places for shillings and pence. There was, however, a space between the " 2 " and the " £ " large enough to enable any one to insert the figure " 1 " in front of the " 2 " without the alteration being noticed. In my opinion Sankey J. was quite justified in finding the facts as to the condition of the cheque in the way he did, and I agree with his finding.

Now, the facts being as I have stated, two contentions were made by Mr. Roche in his very able argument on behalf of the appellants: (1.) That, apart from any question of negligence, the plaintiffs must be taken as against their bankers to have authorized their clerk Klantschi to do what he did. (2.) That Mr. Arthur was negligent in relation to the preparation and signature of the cheque, and that that negligence caused the bankers to pay the cheque, and consequently the plaintiffs cannot complain of the bankers having paid it.

(1) 4 Bing. 253.

With regard to the first point Mr. Roche relied on s. 20 of the Bills of Exchange Act. In my opinion that section does not apply in the case of a cheque which has never been negotiated. Neither the plaintiffs nor Klantschi negotiated it. The defendants by paying it did not become holders in due course or holders at all. It was in this case merely a mandate by a customer to his bankers to pay the cheque. This, however, is unimportant, for in my opinion s. 20 is founded upon a principle of law which applies to this case, and the bankers may under the circumstances of this case be taken to have been in the same position as a holder of the cheque in due course. I must therefore consider s. 20. The important words are, "when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit." By the proviso in sub-s. 2, as against a holder in due course the drawer is precluded from denying the authority. Now this bill was wanting in a material particular, namely, the insertion in writing of the amount. Klantschi must be treated, therefore, as having had authority to fill up this blank in any way he thought fit; but the amount was not wanting where it had to be inserted in figures. That amount was properly filled in, and in my opinion nothing in this section would authorize Klantschi to alter that figure in the way in which he did or at all, or would estop the drawer from denying that authority. To alter that figure would be forgery if done with intent to defraud. Now if he had filled in the upper line as he did, but left the figures "£2.0.0." as they were, of course no banker would have paid the cheque. In my opinion the banker would not have been justified as against his customer in paying such a cheque. Reliance is placed on s. 9, sub-s. 2, of the Bills of Exchange Act. In my opinion that section has no reference to a cheque which has never been negotiated. The bankers were never liable to pay the cheque at all. They could not have been sued upon it by any one, though of course under the implied contract between them and their customer they ought to have paid it but for the discrepancy which I am assuming here existed on the face of it. The existence of the discrepancy between the first and second lines would, in my opinion, have abundantly justified them in refusing to pay it. What then is the position if the drawer has by inserting the amount in figures

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limited the authority of the person who receives it as to the amount which he may insert in writing in the blank space? This point is not without authority. In *Smith* v. *Prosser* (1) Fletcher Moulton L.J. says: "The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument. Notice of such limitation may be given in various ways by the instrument itself. For instance, if in the country where the negotiable instrument is made a negotiable instrument can only be made on paper bearing an impressed ad valorem stamp, the presence of a stamp on the piece of paper would be a notice of limitation of the agent's authority as to the amount of the instrument." The fact that the figure "2" was inserted in the cheque in the proper place for it comes, I think, within the law laid down by Fletcher Moulton L.J. as being a notice of limitation given by the instrument itself. The decision of Bowen L.J. in *Garrard* v. *Lewis* (2) is in favour rather than against the view I have taken. In that case the drawer had put figures in the margin, and the Lord Justice decided that the figures in the margin formed no part of the bill; but his judgment really assumes that if the figures had been in the body of the bill his decision would have been otherwise. In my opinion, the fact that the plaintiffs inserted the amount in the body of this cheque in figures prevented s. 20, if it applied to this cheque, from having any operation, and prevented the principle of law upon which it was founded being applicable to this case. I am clearly of opinion that the first contention fails.

I come, therefore, to consider the second contention. In order to make this contention good the appellants must satisfy us that there was negligence on the part of the plaintiffs. Now Sankey J. in his judgment, which is admirably clear, found there was no such negligence. In my opinion, for the reasons given by Sankey J., he was quite right in coming to that conclusion. In my opinion, leaving out of consideration for the moment the exact duty which a customer owes his bank, Mr. Arthur was not careless, that is, he did nothing which a reasonably prudent man might not have

(1) [1907] 2 K. B. 752. (2) 10 Q. B. D. 30.

done under the particular circumstances. Of course, this is a question of fact and all the circumstances must be looked at. The important circumstance in this case was the confidence that Mr. Arthur had in the honesty of his clerk. The clerk had entered his service with good references and he had been in his service for two years. He was treated as a confidential clerk, and was trusted to go to the bank to get cheques cashed. No act of dishonesty on his part had come to the knowledge of the plaintiffs. It was said that the acts of previous dishonesty ought to have been discovered. Of course they might have been discovered, but to say that every customer owes a duty to his banker to take precautions, or that every reasonably prudent man does habitually take precautions, to test the honesty of his clerk, is in my opinion an absurd proposition. Mr. Arthur was asked by a clerk whom he trusted to sign a cheque for a small amount for petty cash just as he was leaving the office to go to lunch, and he signed the cheque without noticing that the amount was not inserted in writing and that there was a small space between the "£" and the figure "2" sufficiently large to enable another figure to be put there. Of course, he was put off his guard, as many a reasonably prudent man has been. He did nothing which could have misled his banker without a criminal act on the part of the clerk. According to the appellants he should have carefully examined the cheque and have noticed that there was room to insert another figure before the "2." If bankers want to shield themselves from an act like this, they must make a special contract with their customer. It was much discussed before us what is the duty which a customer owes to his banker. After hearing the arguments in this case I remain of the opinion which I expressed in *Kepitigalla Rubber Estates* v. *National Bank of India.* (1) I there stated the duty to be not to mislead the bank, the same duty which a principal in giving a mandate owes to his agent. The misleading may be something in the cheque itself, as an ambiguity in the name of the payee, or by something outside, as the advice note in *Bank of England* v. *Vagliano.* (2)

I think the view which Sankey J. took upon the question of negligence is strongly confirmed by the view taken by other learned

(1) [1909] 2 K. B. 1010, 1022. (2) [1891] A. C. 107.

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judges: see Lord Halsbury in *Scholfield* v. *Earl of Londesborough* (1), where he said that he entirely concurred with what Lindley L.J. had said in *Adelphi Bank* v. *Edwards* (2), that it was wrong to contend that it is negligence to sign a negotiable instrument so that some one else can tamper with it. Lord Watson (3) refers to the same case of *Adelphi Bank* v. *Edwards* (2), and quotes, I think with approval, what Chitty J. had said: "The defendant, in my opinion, as a prudent man of business, was not bound to contemplate that the bill was coming into fraudulent hands, nor that by the perpetration of a crime it would be altered in the manner in which it has been altered." In that case space had been left before the figures "£22.10.0," which enabled a fraudulent holder to insert the figure "2" between "£" and the figures "22." In *Colonial Bank of Australasia* v. *Marshall* (4) five cheques had been altered by adding a figure in spaces left as here, and the cheques so altered were paid by the bankers. It was held that the customer could not be debited with the increased amounts. The jury at the trial had found that the drawer was so negligent that it induced or caused an opportunity to a person to effect the forgery, but the Court held that that afforded no evidence of negligence proper to be left to a jury, and entered judgment for the customer. The judgment of the Court was delivered by Sir Arthur Wilson, the other members of the Court being Lord Halsbury, Lord Macnaghten, and Sir Alfred Wills. He said (5): "Whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation." I recognize that that case is not binding on us, and that it may go further than *Scholfield* v. *Earl of Londesborough* (6), yet it is the opinion of great judges. The strength of the case there was that the Court held that there was no evidence to go to the jury, and they set aside the verdict for the defendants and entered judgment for the plaintiff. It is impossible for this Court to say that Sankey J.'s finding that there

(1) [1896] A. C. 532.
(2) Not reported.
(3) [1896] A. C. 540, 541.
(4) [1906] A. C. 559.
(5) Ibid. 568.
(6) [1896] A. C. 514.

was no negligence ought to be set aside. I should have arrived at the same conclusion.

As the second contention of Mr. Roche is founded on negligence, it follows that it fails. If, however, negligence had been proved, there would have arisen the further question whether the negligence was the proximate or effective cause of the fraud or the natural consequence of the neglect of duty. In my opinion the authorities establish that it was not: see *Baxendale* v. *Bennett* (1); *Union Credit Bank* v. *Mersey Docks and Harbour Board* (2); *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (3) In the latter case Kennedy J. says (4): "He must show that the customer caused him to pay the money upon the forged cheque. It is not enough to show that the customer gave occasion for his so paying—that different conduct would have prevented the fraud and the payment by the banker." See also the top of p. 268. The strongest case against this view is *Halifax Union* v. *Wheelwright*. (5) That was a special case, and the arbitrator found that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk. This passage in the award is cited in the judgment of the Court, and probably justified the Court in deciding as they did. I think it must be taken, however, that the Court acted to some extent on *Young* v. *Grote* (6), and in fact they were bound by that decision. This brings me to the consideration of *Young* v. *Grote* (6), which was strongly relied on here. It is not, I think, having regard to the finding of no negligence, necessary for us to express an opinion as to whether this case is good law, but as all the authorities were cited to us, and as Sankey J. stated in his judgment that it was not a case which could usefully be cited as an authority, I think we are bound to express our opinion. After full consideration of the authorities, I agree entirely with what Sankey J. said. If the decision was founded on negligence, it was wrong. If it was founded on the doctrine as suggested by Lord Halsbury in *Scholfield* v. *Earl of Londesborough* (7), "the

(1) 3 Q. B. D. 525.
(2) [1899] 2 Q. B. 205.
(3) 11 Com. Cas. 255.
(4) Ibid. 267.
(5) L. R. 10 Ex. 183.
(6) 4 Bing. 253.
(7) [1896] A. C. 523.

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cheques left by him to be filled up by his wife when filled up by her become his genuine orders" (I do not think the facts of the case warrant this, but that matters not), then there is no need to cite *Young* v. *Grote* (1) in support of a proposition which is free from doubt. This was obviously the opinion of Lord Halsbury, and I gather it was the opinion of the Court in *Colonial Bank of Australasia* v. *Marshall.* (2) In *Smith* v. *Prosser* (3) Vaughan Williams L.J. says in terms that *Young* v. *Grote* (1) and *Ingham* v. *Primrose* (4) have ceased to be law. It is unnecessary to go through all the cases. In no case in the Court of Appeal or the House of Lords that I am aware of has it ever been acted upon. When referred to, various explanations have been given as to the ground of the decision, and it has always been distinguished. I think Sankey J.'s observations on it were quite justified.

In my opinion this appeal fails and should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Edward H. Coopman.*

Solicitors for defendants: *Morley, Shirreff & Co.*

(1) 4 Bing. 253.
(2) [1906] A. C. 559.
(3) [1907] 2 K. B. 746.
(4) 7 C. B. (N.S.) 82.

W. F. B.

D. P. ANDERSON & CO., LIMITED *v.* THE LIEBER CODE COMPANY.

1917
June 8.

[1916 D. 648.]

Copyright—Telegraphic Code—Compilation of Words in themselves meaningless—"Original literary work"—Copyright Act, 1911 (1 *& 2 Geo.* 5, *c.* 46), *ss.* 1, 35.

The plaintiffs published a code of made-up words considered suitable for cabling purposes. Each word, which of itself was meaningless, consisted of five letters only, and differed from every other word in the code in at least two out of the five letters. In the preparation of the code all words which were unpronounceable were eliminated, as were also all those which might lend themselves to error in transmission :—

Held, that the code was an "original literary work" within the meaning of that expression in s. 1, sub-s. 1, of the Copyright Act, 1911.

Action tried by Bailhache J.

The plaintiffs claimed an injunction, damages, and further relief in respect of an infringement by the defendants of the copyright in a telegraphic code published as the "Empire Cipher Code," the property in which was vested in the plaintiffs.

The plaintiffs' code was produced in this way: A Mr. Worrall, who was in the plaintiffs' employment, was instructed by them to make up a large number of five-letter words which would be suitable for cabling purposes, and accordingly he made up 450,000 words, each of which was in itself meaningless, and it was an essential feature of the collection that each word differed from every other word in at least two out of the five letters. From the list of 450,000 words so made up Mr. Worrall then proceeded to eliminate a large number, and in doing this he proceeded upon two principles—first, in order to comply with the requirements of the cable companies, who insisted that words tendered to them for transmission should be pronounceable, he had to exercise his skill by eliminating those words which in his judgment were unpronounceable; and, secondly, guided to some extent by the requirements of the Morse Code, he rejected as far as possible those words which were likely to lead to error in transmission. By this double process of elimination he reduced his collection of words to 100,000, which he considered

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suitable for use as ciphers for telegraphic purposes, and those words constituted the plaintiffs' code.

The plaintiffs alleged that the defendants in their publication called the "Lieber Code" had unlawfully reproduced a substantial part of the "Empire Cipher Code."

The defendants denied, inter alia, that the plaintiffs' code could be the subject of copyright.

The question of damages was left to a jury, who assessed the amount at 1250*l.*, and thereupon the question whether there could be copyright in the code came on for argument.

Hohler, K.C., and *E. G. Palmer*, for the plaintiffs. The plaintiffs' code is a proper subject of copyright, and as their rights have been infringed by the defendants they are entitled to recover the damages assessed by the jury.

Kerly, K.C., and *D. M. Hogg*, for the defendants. The plaintiffs' code is not an "original literary work" within the meaning of that expression in the Copyright Act, 1911 (1), inasmuch as it is a mere compilation of unmeaning words arbitrarily constructed of five letters. Nothing can be "literary" which does not involve an appreciation of the meaning of words. In *Ager* v. *Peninsular and Oriental Steam Navigation Co.* (2) and in *Ager* v. *Collingridge* (3) the code words there in question were real words taken from different languages.

[BAILHACHE J. What is the difference between making a code by taking a word from another language, but which is not used with the significance it bears in that language, and making a code out of artificially constructed words?]

The latter cannot be called a "literary work," seeing that it is composed of an arbitrarily arranged collection of letters having no meaning. Further, in *Ager* v. *Peninsular and Oriental Steam Navigation Co.* (2) and *Ager* v. *Collingridge* (3) the question was whether

(1) Copyright Act, 1911, s. 1, sub-s. 1: "Subject to the provisions of this Act, copyright shall subsist . . . . in every original literary . . . . work . . . ."

Sect. 35, sub-s. 1: "In this Act, unless the context otherwise requires,—

"'Literary work' includes maps, charts, plans, tables, and compilations. . . . ."

(2) (1884) 26 Ch. D. 637.

(3) (1886) 2 Times L. R. 291.

the work was a "book" within s. 2 of the Copyright Act, 1842; now, the question is whether the plaintiffs' code is an "original literary work," and it is submitted that it is not. [They also cited *Hollinrake* v. *Truswell* (1) and *Libraco, Ld.* v. *Shaw Walker, Ld.* (2)]

BAILHACHE J., after stating the facts and reading s. 1, sub-s. 1, and s. 35, sub-s. 1, of the Copyright Act, 1911, continued as follows: The plaintiffs say that their code is a compilation which is an "original literary work" within the meaning of that expression in the Act. On behalf of the defendants it is contended that it is not a literary work, either original or otherwise, and the ground upon which this contention is based is that the words in the code are not words in the ordinary sense at all, but are merely collections of letters which are in themselves meaningless and are made up in a merely mechanical way. I cannot accede to that argument. The words—I call them so for want of a better name—are for use for telegraphic purposes, and to each of them a meaning can be attached by the person sending the message and also by the addressee, provided, of course, he is informed of the meaning attached to it by the sender. They are telegraphic words or ciphers. Since the Copyright Act, 1911, there has been no case which assists me in the decision of the question, but there were decisions prior to that Act, and to two only of these I need refer. For a year or two before 1884 a Mr. Ager had occupied himself in producing similar results to those Mr. Worrall has endeavoured to produce, with this difference: Mr. Ager, who was an accomplished linguist, took actual words from the dictionaries of seven or eight languages—words which in those languages had a definite meaning attached to them, although as collected by him they were just as meaningless as the collections of letters made up by Mr. Worrall. In Mr. Ager's code it was not intended that the words should bear their natural meaning, for that would have defeated his sole object, which was to produce actual words suitable for coding and transmission by cable. At that time the cable companies insisted upon code words being actual words in one or other of certain languages; hence it was that Mr. Ager selected actual words for his purpose, although, as I have said, they were, when collected, as meaningless for the purpose for

(1) [1894] 3 Ch. 420. (2) (1913) 30 Times L. R. 22.

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which they were intended to be employed as the collections of letters made up by Mr. Worrall and embodied in the plaintiffs' code. Mr. Ager copyrighted his work, which on two occasions was considered by the Court. In the first case, *Ager* v. *Peninsular and Oriental Steam Navigation Co.* (1), the plaintiff's right to copyright in the work was not contested, and the only question was whether it had been infringed by the defendants. In the second case, however, *Ager* v. *Collingridge* (2), Kay J., who had tried the first case also, held that the book was a proper subject of copyright, and in the course of his judgment he said this: "There could be no doubt of the enormous utility of the book, and of the service rendered to anybody desirous of forming a telegraphic code by an undertaking which once for all eliminated words liable to error, and supplied such a collection of the aptest words for telegraphic use." That last sentence is as applicable to Mr. Worrall's work as to Mr. Ager's, always bearing in mind the difference between the collection of words formed by Mr. Worrall as compared with the words selected by Mr. Ager from different languages. It is true that that decision was before the Copyright Act, 1911, and the words of the Act considered by Kay J. were not the same as those in the Act of 1911; but Mr. Kerly in his very able and candid argument has failed to convince me that Mr. Worrall's work is not a proper subject of copyright. In substance, and for purposes of copyright, this work seems to me to be indistinguishable from the work of Mr. Ager. I come, therefore, to the conclusion that the plaintiffs are right in saying that their code is a proper subject of copyright, and as that copyright has been infringed I give judgment in their favour for 1250*l.*, at which sum the jury has assessed the damages. The plaintiffs are also entitled to further relief, the precise terms of which, if not agreed upon by the parties, will be settled by me. (3)

Judgment for plaintiffs.

Solicitors for plaintiffs: *Montagu, Mileham & Montagu.*
Solicitor for defendants: *F. Harold Stollard.*

J. S. H.

(1) 26 Ch. D. 637.
(2) 2 Times L. R. 291, 292.
(3) On a subsequent date Bailhache J. settled the order as

Applied. A/S TANKEXPRESS. [1948] 2 All E.R. 939.

Referred to. CHARLES RICKARDS, LD. *v.* OPPENHAIM [1950] 1 K. B. 616

[IN THE COURT OF APPEAL.]

C. A.
1917
June 13, 14.

PANOUTSOS *v.* RAYMOND HADLEY CORPORATION OF NEW YORK.

Sale of Goods—Contract for Sale and Delivery by Instalments—Condition as to Payment—Breach of Condition—Waiver by Seller—Right to cancel Contract—Notice by Seller of Intention to cancel.

A contract, made in September, for the sale and shipment of 4000 tons of flour, to be shipped to Greece not later than November 7, provided that "each shipment shall be deemed a separate contract," and that payment should be "by confirmed bankers' credit." The buyer opened a bankers' credit which was not in fact "confirmed"; and the seller, with notice of that fact, made some shipments and received payment therefor by means of the credit, and also obtained from the buyer an extension of time to November 30 for shipment of the balance of the flour. On November 25 the seller cancelled the contract as to the shipment of the balance of the flour, without any previous notice, upon the ground that the credit was not in accordance with the contract:—

Held, that the seller, by waiving for a time the breach of the condition as to a confirmed credit, was not thereby bound to act upon that credit up to the end of the contract, but that he was not entitled to cancel the contract without giving the buyer reasonable notice of his intention to cancel so as to give the buyer an opportunity of complying with the condition.

Decision of Bailhache J. [1917] 1 K. B. 767 affirmed.

APPEAL from the judgment of Bailhache J. upon an award made in the form of a special case; reported [1917] 1 K. B. 767.

By a contract in writing made in London and dated September 27,

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to the further relief to which the plaintiffs were entitled. He granted a perpetual injunction restraining the defendants, their servants and agents, from printing, selling, or exposing for sale, circulating or distributing within the United Kingdom, copies of their code or any other work containing five-letter words with two-letter differences copied or taken or colourably imitated from the plaintiffs' code; and he ordered the delivery up on oath of all copies of their code in their possession, or in that of their servants or agents within the United Kingdom, containing five-letter words with two-letter differences copied or taken from the plaintiffs' code, and also all plates, &c., within the United Kingdom used for the purpose of producing the same.

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1915, which was made on the printed form of the "London Flour Trade Association. American Flour Contract," the Raymond Hadley Corporation of New York (herein called the sellers), who had also a place of business in London, sold to Panoutsos (herein called the buyer) 4000 tons of flour to be despatched from the Atlantic seaboard by steamer or steamers to Greece as per bills of lading dated not later than November 7, 1915; "each shipment shall be deemed a separate contract"; and there was this clause written into the contract: "Cash against documents in New York. Payment by confirmed bankers' credit." Any dispute arising out of the contract was to be referred to arbitration according to the printed rules indorsed thereon.

On October 16 the National Bank of Commerce of New York wrote to the sellers in New York stating that they had been requested to open a credit in favour of the sellers for about $270,000 in respect of the shipment of 4000 tons of flour shipped up to November 7, 1915, and adding: "In advising you that this credit has been opened we are acting merely as agents for our foreign correspondents and cannot assume any responsibility for its continuance." This letter showed that the credit was not irrevocable and therefore was not a "confirmed bankers' credit." The sellers, however, on October 21 and again on October 27, 28, 29, and 30 made shipments of flour in part fulfilment of the contract, for which they were duly paid by the New York bank in pursuance of the credit in exchange for shipping documents. Meanwhile on October 27 the sellers took exception to the credit as not being irrevocable. On November 15 they requested the buyer to extend the time for the shipment of the balance of the flour from November 7 to November 30, and to this the buyer agreed. On November 25 the sellers notified the buyer that the balance of their contract was cancelled on the ground (so far as material) that the buyer had failed to perform the condition as to "payment by confirmed bankers' credit." The buyer refused to accept the cancellation, and the dispute was referred to arbitration. The arbitrators found that the credit was not a confirmed bankers' credit within the meaning of the contract, but that the sellers took no exception to it at the time it was opened.

Before the arbitrators the sellers contended that the buyer had

failed to comply with the conditions of the contract, as he had failed to open a credit at New York, which would be irrevocable until November 30; and that the fact that they had made shipments without insisting on this condition did not release the buyer in respect of subsequent shipments, especially having regard to the term of the contract that "each shipment shall be deemed a separate contract." The buyer contended that the sellers had accepted as satisfactory the credit which had been opened, and, having made a shipment under it, had waived any possible objection to it and could not repudiate their obligation to ship the balance of the flour, or could not do so without giving due notice to him so as to enable him to remove any valid objection and furnish such a credit as would satisfy them.

The arbitrators awarded that the sellers were in default in not shipping the balance of the flour in accordance with the contract, and that they should pay a certain sum as damages.

The question for the opinion of the Court was whether or not upon the above facts there was any evidence upon which the arbitrators could properly find that the sellers had waived the term in the contract that payment should be by confirmed bankers' credit.

If the Court should be of opinion that the question should be answered in the affirmative, then the award was to stand; if in the negative, then the award was to be in favour of the sellers.

Bailhache J. held that when the sellers knew that the credit was not in order, and yet proceeded to act upon it as if it was in order, they must be taken to have waived the informality so long as they chose to act upon that credit, but that they were not bound to act upon it to the end merely because they acted upon it at first and waived the informality up to a point. In his opinion the sellers could at any time insist upon the credit being put in order, but if they desired to cancel the contract because the credit upon which they had acted was not in order they must give reasonable notice to the buyer of their intention to do so; which they had not done. He therefore confirmed the award. The sellers appealed.

J. B. Matthews, K.C., and *Stuart Bevan*, for the sellers. There was no evidence that the sellers had waived the performance of the

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condition as to a "confirmed bankers' credit." Each shipment was to be deemed a separate contract, and a waiver, if there was one, of the condition in the case of one or more shipments was no waiver of the condition in the case of other shipments under other contracts. Even apart from the shipments being separate contracts, the facts do not show any waiver by the sellers of the condition.

Secondly, if there was a waiver of the condition as regards the earlier shipments, the sellers were entitled without notice to cancel the contract as to the balance of the flour on the ground that there was no confirmed bankers' credit: *In re Tyrer & Co. and Hessler & Co.* (1) Further, if notice was necessary, the sellers in New York by a cablegram on October 27 to their London house, which was communicated to the buyer on the next day, clearly intimated that they would insist upon the condition, and this amounted in effect to notice of their intention to cancel if the credit was not put right. (2)

R. A. Wright (*Roche, K.C.*, with him), for the buyer. There was evidence of waiver of the condition. The principle is stated by Bowen L.J. in *Bentsen* v. *Taylor, Sons & Co.* (3) thus: "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent, but that they only intended to rely on the misdescription as a breach of warranty, treating the contract as still open for further performance?" If the condition as to a confirmed bankers' credit was a single indivisible condition applicable to all the shipments, the acts and conduct of the sellers down to November 25 treated the existing credit as a fulfilment of the condition once and for all. If it was not a single indivisible condition, and the condition applied to each shipment separately, then the sellers, by

(1) (1901) 6 Com. Cas. 143; (1902) 7 Com. Cas. 166.

(2) It is unnecessary to set out the cablegram or subsequent documents. When the case was before Bailhache J. there was no evidence that this cablegram had been communicated to the buyer. Before the Court of Appeal it was proved that it was so communicated. It was agreed between the parties that the Court of Appeal should deal with the new facts and draw such inferences as they thought right, instead of sending the case back to the arbitrators.

(3) [1893] 2 Q. B. 274, 283.

making the shipments and receiving payment out of the credit after notice that the credit was not a confirmed bankers' credit, waived the performance of the condition so far as those shipments were concerned, and by doing so led the buyer to believe that they were willing to go on upon the existing credit; and if they intended to rely on its non-performance in respect of future shipments they must first give reasonable notice to that effect to the buyer so as to give him an opportunity of putting the credit right. No such notice was given.

Stuart Bevan in reply.

VISCOUNT READING C.J. (after referring to the contract and the facts, and stating that the letter of October 16 from the National Bank of Commerce showed that the credit was not irrevocable, and to that extent did not comply with the condition of the contract as to "confirmed bankers' credit," and yet the sellers made shipments without questioning the credit until October 27). The question put to the Court is "whether or not upon the above findings of fact"—to which must now be added "coupled with our findings of fact"—"there was any evidence upon which the arbitrators could properly find that the sellers had waived the term in the contract that payment should be by confirmed bankers' credit." It was therefore admitted that there was no confirmed bankers' credit, but the buyer contended that there had been a waiver of that condition of the contract. In answer to that the sellers said that there had been no such waiver, and if there had been a waiver that they were entitled at any time to insist upon the condition being performed. The buyer replied that no doubt the sellers were entitled to insist upon the performance of the condition, but that, having waived its performance hitherto, they must give reasonable notice to the buyer of their intention to insist upon its performance in the future so as to give him an opportunity of putting the credit right. Bailhache J. held that the sellers must be taken to have waived the performance of the condition, that the buyer was entitled to reasonable notice, and that such notice had not in fact been given. He therefore answered the question in favour of the buyer.

In my opinion the learned judge was right. It is open to a party to a contract to waive a condition which is inserted for his benefit.

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Viscount Reading C.J.

If the sellers chose to ship without the safeguard of a confirmed bankers' credit, they were entitled to do so, and the buyer performed his part of the contract by paying for the goods shipped, though there was no confirmed bankers' credit, inasmuch as that condition had been waived. If at a later stage the sellers wished to avail themselves of the condition precedent, in my opinion there was nothing in the facts to prevent them from demanding the performance of the condition if they had given reasonable notice to the buyer that they would not ship unless there was a. confirmed bankers' credit. If they had done that and the buyer had failed to comply with the condition, the buyer would have been in default, and the sellers would have been entitled to cancel the contract without being subject to any claim by the buyer for damages. –

In *Bentsen* v. *Taylor, Sons & Co.* (1) Bowen L.J. stated the law as to waiver thus: "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent?" Reading sellers for defendants and buyer for plaintiff in that passage, it applies exactly to the present case. The sellers did lead the buyer to think so, and when they intended to change that position it was incumbent on them to give reasonable notice of that intention to the buyer so as to enable him to comply with the condition which up to that time had been waived.

The case of *In re Tyrer & Co. and Hessler & Co.* (2) was cited as an authority for the proposition that the moment the sellers chose to avail themselves of the failure to perform the condition precedent they could put an end to the contract without giving the buyer an opportunity of remedying the default which had hitherto been waived. That case is not an authority for that proposition. It shows that, where there are stipulated times in a charterparty for payment of the hire of a ship and a power to withdraw the ship if the payment is not made at the stipulated time, the mere fact that there has been default in payment at one or more stipulated times, of which advantage has not been taken, does not entitle the party in default at a subsequent time to a notice so as to enable him to

(1) [1893] 2 Q. B. 283.
(2) 6 Com. Cas. 143; 7 Com. Cas. 166.

comply with the condition before the right to withdraw arises. That is a totally different case from the present. I cannot find any authority to support the proposition that, when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-mentioned party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract. It seems to me to follow from the observations of Bowen L.J. in *Bentsen* v. *Taylor, Sons & Co.* (1) that there must be reasonable notice given to the buyer before the sellers can take advantage of the failure to provide a confirmed bankers' credit. That is the decision of Bailhache J.

The only question which remains is whether reasonable notice has been given. We have more material before us than Bailhache J. had when he came to the conclusion that no reasonable notice had been given. I am not prepared to draw the inference of fact that reasonable notice had been given before the sellers cancelled the contract. If notice had been given on October 27, and on November 25 the sellers had cancelled the contract, I should have thought that that would have been ample notice to enable the buyer to provide the confirmed credit in New York. But I cannot find any such notice on the part of the sellers of their intention to insist upon the performance of the condition. [His Lordship referred to the letters, and said that the conclusion he came to was that the sellers were content to make shipments upon the credit opened on October 16, which they knew from the letter of that date was not a confirmed bankers' credit, until they determined to cancel, which they did on November 25 without giving reasonable notice of their intention to cancel.]

The result is that the decision of Bailhache J. is right, and the appeal must be dismissed.

LORD COZENS-HARDY M.R. and SCRUTTON L.J. agreed.

Appeal dismissed.

Solicitors for buyer: *Stibbard, Gibson & Co.*

Solicitors for sellers: *Coward & Hawksley, Sons & Chance.*

(1) [1893] 2 Q. B. 283.

W. F. B.

C. A.
1917
April 26, 27, 30.

[IN THE COURT OF APPEAL.]

MARTEN *v.* WHALE.

[1916 M. 1751.]

Sale of Goods—Agreement to Buy—Conditional Agreement—Buyer in Possession—Sale to Third Person—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 2.

The plaintiff and one Thacker entered into an agreement in writing by which Thacker agreed to sell and the plaintiff to buy a plot of land for the sum of 385*l.*, "subject to purchaser's solicitors' approval of title and restrictions"; and in consideration of the above transaction the plaintiff agreed to sell and Thacker agreed to buy a motor car for the sum of 300*l.*, "completion of such sale and purchase to be carried out simultaneously with above transaction." Shortly afterwards the plaintiff gave possession of the motor car to Thacker "on loan," none of the purchase-money for it having been paid, and Thacker sold it to the defendant, who bought in good faith and without notice of any right of the plaintiff in respect thereof. Subsequently the plaintiff's solicitors refused to approve of the restrictions in connection with the land. In an action to recover possession of the car:—

Held, assuming that the two parts of the document were dependent on each other, that the agreement as to the land did not confer a mere option on the plaintiff to buy, but was an agreement by him to buy conditional upon his solicitors approving of the restrictions; that consequently the agreement as to the sale of the motor car to Thacker was conditional; that a conditional agreement came within s. 25, sub-s. 2, of the Sale of Goods Act, 1893; and that therefore Thacker had "agreed to buy" the car within the meaning of the section, and the defendant had acquired a good title thereto.

Judgment of Rowlatt J. [1917] 1 K. B. 544 affirmed.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury; reported [1917] 1 K. B. 544.

The action was brought to recover a motor car and damages for its detention. The defence was that one Thacker had agreed to buy the car from the plaintiff, and was in possession of it with the plaintiff's consent, and that, as the defendant bought the car from Thacker in good faith and without notice of any right of the plaintiff, she had obtained a good title to it under s. 25, sub-s. 2, of the Sale of Goods Act, 1893.

The following agreement, dated June 27, 1916, was entered into between Thacker and the plaintiff:

"It is agreed between Frank Thacker and Frank W. Marten that the said F. Thacker sells and the said F. W. Marten buys the plot of land selected by purchaser, having a frontage of 100 feet to the new road now made to the satisfaction of the local authorities, and situate on the Banstead Downs estate, Sutton, with a depth of 400 feet, freehold, at and for the sum of 385*l.*, subject to purchaser's solicitors' approval of title and restrictions, the said sale and purchase to be completed on or before the 24th July, 1916.

"In consideration of the above transaction the said Frank W. Marten agrees to sell and the said Frank Thacker agrees to purchase the 12/1 Renault saloon motor car at and for the sum of 300*l.*, completion of such sale and purchase to be carried out simultaneously with above transaction."

On June 29, 1916, the plaintiff allowed Thacker to have possession of the car "on loan," and took a receipt for it, written at the foot of the same document as the above-mentioned agreement, as follows: "Received on loan the above motor car in good condition, to be returned to you on demand. Signed F. T." Thacker desired to sell the car, and the car was sent to a garage where it could be shown to intending purchasers.

On August 25 Thacker, who had not obtained the plaintiff's solicitors' approval of title or restrictions, sold and delivered the car to the defendant, who bought in good faith and without notice of any defect in the seller's title.

On September 29 the plaintiff, who had heard of the sale to the defendant, demanded the return of the car. The time for completion of the sale and purchase of the plot of land was extended by consent to November 18. On October 31 the abstract of title was sent, and on November 14 the plaintiff's solicitors refused to approve of the restrictions in connection with the plot of land, and the sale of the plot was not carried out.

Rowlatt J. held, assuming in favour of the plaintiff that the two parts of the agreement were interdependent and not separate, that Thacker was a person who had "agreed to buy" the motor car within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act, 1893, conditionally upon the plaintiff's solicitors approving of the restric-

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tions in respect of the land, and that the defendant therefore had acquired a good title to the car. He accordingly gave judgment for the defendant. The plaintiff appealed.

J. G. Wood and *Patrick Hastings*, for the plaintiff. Thacker had not under the agreement of June 27 "agreed to buy" the car within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act, 1893. The two parts of the document are interdependent, and the car is only to be sold if the land is sold. The sale of the land depends upon the title and restrictions being approved by the plaintiff's solicitors. Though the Court can review the refusal of the solicitor to approve the title, it cannot review his refusal to approve of the restrictions. Approval of the restrictions is a purely arbitrary power given to the solicitor, provided that it is exercised honestly, and there cannot be a contract of purchase and sale where it depends upon the arbitrary will of one of the parties whether the matter shall go on. There is only an option to purchase until the approval is given, and the contractual relationship of vendor and purchaser does not exist until the option is exercised. There must be a contract capable of being enforced by specific performance. A person who has an option to buy is not a person who has "agreed to buy" within the meaning of s. 9 of the Factors Act, 1889 (52 & 53 Vict. c. 45): *Helby* v. *Matthews*. (1) That section, though not repealed, is now, so far as material, repeated in s. 25, sub-s. 2, of the Sale of Goods Act, 1893. To make a contract for the purchase and sale of the motor car both parties must be bound, the one to sell and the other to buy. "In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it." (2) "A promise cannot be conditional on the mere will of the promiser; for by promising to do a thing only in case it please himself he is not bound to anything": Leake on Contracts, 6th ed., p. 456. [*Von Hatzfeldt-Wildenburg* v. *Alexander* (3) was also referred to.]

W. F. Swords, for the defendant. The two parts of the document of June 27, 1916, are independent. If that is so, Thacker clearly agreed to buy the car, the sale of the car being independent of the sale of the land. Possession of the car was given to Thacker to

(1) [1895] A. C. 471. (2) Ibid. 479, 480, per Lord Watson.
(3) [1912] 1 Ch. 284.

enable him to sell it. Thacker therefore had "agreed to buy" the car within the meaning of s. 25, sub-s. 2, of the Act.

Even if the two parts of the document are interdependent, the words "subject to purchaser's solicitors' approval of title" do not prevent the document being a contract: *Hussey* v. *Horne-Payne*. (1) As to the restrictions, if they were known to both parties to exist, the purchaser's solicitors could not refuse his approval on the ground of their existence: *Alderdale Estate Co.* v. *McGrory* (2); and the contract could be specifically enforced. So too, where the restrictions were not known to the purchaser, specific performance would be enforced unless the restrictions were such as the solicitors might reasonably refuse to approve. Therefore Thacker "agreed to buy" the car, and the defendant obtained a good title to it. [*Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (3) was also referred to.]

J. G. Wood in reply.

SWINFEN EADY L.J. The plaintiff in this action sued the defendant for the return of a motor car and damages for its detention. The defence was that the defendant bought the car from Thacker in good faith and without notice of any right of the plaintiff in respect thereof within s. 25, sub-s. 2, of the Sale of Goods Act, 1893. Rowlatt J. held that the defendant was protected by the section and gave judgment for her.

The question is whether the defendant had acquired a good title to the car under s. 25, sub-s. 2, of the Act. That sub-section provides: "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." It is not disputed that Thacker obtained possession of the car with the

(1) (1879) 4 App. Cas. 311, 321, 322.

(2) [1917] 1 Ch. 414.

(3) [1899] 1 Q. B. 643.

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consent of the owner, and that the defendant received the car in good faith and without notice of any lien or other right of the original seller in respect thereof. It is said that Thacker had not "agreed to buy" the car. Sect. 1, sub-s. 1, of the Act defines "a contract of sale of goods" as being "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price." It is clear that the car was to be sold for a money consideration. By sub-s. 2, "A contract of sale may be absolute or conditional." By sub-s. 3, "Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell." By sub-s. 4, "An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred." It is said that in this case there is no agreement to sell. The argument is that the two parts of the document of June 27, 1916, must be taken together, that the second part is not independent of the first, but that the whole is one entire arrangement; that the sale of the car was conditional on the sale of the land going through; and that the plaintiff had a mere option to buy the land, and had not agreed to buy it at the price of 385*l.*, paying for it by a motor car worth 300*l.* and the balance of 85*l.* in cash. There is nothing in the terms of the contract which makes the second part conditional upon the purchase of the land going through, or that the motor car should be accepted in part payment of the land. It only says that the two transactions are "to be carried out simultaneously." The value of the land and of the car was fixed at a price in money, and there is no provision that both are not to be paid for in money.

It was, however, pressed upon us that the plaintiff could refuse to proceed further in the matter of buying the land by merely saying that he did not approve of the restrictions, or by directing his solicitor to refuse to approve of them, and that therefore the agreement conferred on him a mere option to buy. In my opinion the agreement does not give the plaintiff a mere option to buy; it amounts to a contract by the vendor to sell and the purchaser to

buy. It is intended by both parties to be a contract of purchase and sale. It is true that the contract is subject to the condition that the purchaser's solicitors shall approve of the restrictions, but that does not prevent it from being a contract. By s. 1, sub-s. 2, a "contract of sale" may be absolute or conditional. Even assuming that the two parts of the agreement are interdependent, Thacker was a person who had agreed to buy the car under a conditional contract, and therefore under a contract of sale within the meaning of the Act.

It is urged that the authorities are against this view. In *Von Hatzfeldt-Wildenburg* v. *Alexander* (1) the decision turned upon the question whether certain letters contained a complete contract, and the learned judge held that, having regard to the reference in one of the letters to a condition as to a formal contract and to other conditions, the letters did not constitute a binding contract. That case does not assist us in determining this case. There is here a definite contract in writing which is intended by the parties to be a contract. In *Helby* v. *Matthews* (2) the question turned upon s. 9 of the Factors Act, 1889, which, so far as material, is identical in terms with s. 25, sub-s. 2, of the Sale of Goods Act, 1893. The owner of a piano let it on hire, the piano to become the property of the hirer upon payment of all the instalments. The hirer, after having paid some of the instalments, pledged the piano with a pawnbroker. It was held that the hirer had not "agreed to buy" the piano within the meaning of s. 9, as those words meant a person who had bound himself by agreement to buy, and did not include a person who had an option to buy. In that case there was no agreement to buy; the hirer could deliver up the piano at any time to the owner, or he might, if he chose to do so, pay all the instalments and buy the piano. He was under no obligation of any kind to buy.

The conclusion I have come to is that this document does not confer an option but constitutes a contract, and none the less so because it is subject to the approval of the restrictions by the purchaser's solicitors. Therefore Thacker was a person who had "agreed to buy" the motor car within the meaning of s. 25, sub-s. 2, of the Act of 1893, and the defendant obtained a good title to it. The appeal must be dismissed.

(1) [1912] 1 Ch. 284. (2) [1895] A. C. 471.

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SCRUTTON L.J. I have come to the same conclusion. The defendant bought the motor car from Thacker in good faith and without notice of any right of the plaintiff thereto. The plaintiff claimed the car, and the defendant relied upon s. 25, sub-s. 2, of the Sale of Goods Act, 1893. The same provision in almost identical words is contained in s. 9 of the Factors Act, 1889, and as that section has not been repealed the two clauses in the two Acts stand together. I will take s. 9 of the Factors Act, 1889. The object of the section is to give a good title to a person who has bought or agreed to buy goods from a person who has, with the consent of the owner, possession of them or of the documents of title thereto. The doctrine was first applied to factors and other mercantile agents. Sect. 9 extends the doctrine to persons who have agreed to buy goods, but have not completed the purchase. The defendant said that Thacker had "agreed to buy" the motor car; the plaintiff said that Thacker had not. The plaintiff and Thacker had signed a document which consisted of two parts; the first related to the sale by Thacker to the plaintiff of a plot of land, and the second to the sale by the plaintiff to Thacker of a motor car. The plaintiff contends that Thacker only agreed to buy the car if the plaintiff carried through the transaction for the purchase of the land from Thacker, which transaction the plaintiff might at his option repudiate, and that, as the carrying through of the transaction as to the land was at the plaintiff's option, it cannot be said that the plaintiff had entered into a binding agreement to sell, and that Thacker had "agreed to buy," the car. On the other hand the defendant says that the sale of the car was to be carried out whether or not the sale of the land went through. If that is so, it is clear that Thacker had agreed to buy. The defendant further says that, if the two parts of the agreement are interdependent, the matter did not rest only on the plaintiff's option; that the plaintiff had to appoint a solicitor, and the solicitor had to give an honest opinion as to approving of the restrictions, and that therefore there was an agreement to buy the car. I am inclined to think that the two parts of the document are dependent on each other, and I will deal with the case upon this assumption. What is the nature of the transaction? I cannot read the first part of the document as giving the plaintiff a mere option. There is an implied provision that the

plaintiff shall appoint a solicitor and shall consult him in good faith, and that the solicitor shall give his honest opinion. That is not an option ; it is a conditional contract, and I agree with Swinfen Eady L.J. that a conditional agreement to buy is an agreement to buy within the Act. In my opinion the defendant comes within the protection of the section, as she has bought the car from a person who had " agreed to buy " it and had obtained possession of it with the consent of the seller.

BRAY J. I agree. The question is whether Thacker was a person who had " agreed to buy " the motor car. He had by the document of June 27 entered into an agreement. The latter part of the document relates to the car. To my mind nothing can be clearer than that both parties intended to enter into a contract of sale and purchase of the car. The transaction was to be carried out simultaneously with the transaction relating to the sale of the land. I assume, without deciding it, that the contract for the sale of the car was a conditional contract. That does not prevent it from being an agreement to buy within s. 25, sub-s. 2, of the Act. Sect. 1 describes what a contract of sale is. A contract of sale may be conditional. There is no definition of an agreement to buy, but the above description or definition must apply to an agreement to buy within s. 25, sub-s. 2. The plaintiff contended that there was no contract at all because the carrying out of the transaction was entirely subject to the volition of the plaintiff. Is that the true view of the document ? The plaintiff is bound to appoint a solicitor, and to submit to him the title and the restrictions, and there must be a bona fide exercise by the solicitor of his discretion to approve the restrictions. In my opinion, Thacker " agreed to buy " the car, and, as the defendant purchased and obtained possession of the car from him in good faith and without notice of any right of the plaintiff thereto, she has a good defence to this action.

Appeal dismissed.

Solicitors for plaintiff : *Lendon & Carpenter.*
Solicitors for defendant : *Kingsbury & Turner.*

W. F. B.

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May 9.

ATTORNEY-GENERAL *v.* SALT UNION, LIMITED.

Revenue—Mineral Rights Duty—Brine—Duty on Rental Value of Right to Work—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 20.

By s. 20 of the Finance (1909-10) Act, 1910, "there shall be charged . . . . on the rental value of all rights to work minerals . . . . a duty (in this Act referred to as a mineral rights duty) . . . ."

The defendants owned land on and in which were two vertical shafts used by them for the purpose of pumping to the surface natural brine, i.e., water which had become fully saturated with salt in solution. The brine so pumped up was put by the defendants to commercial use. It was impossible to ascertain whence the brine had come or where its saturation had taken place, but as there were no surface subsidences within the defendants' land the inference was that the brine did not come from and had not been saturated within the boundaries of the defendants' land :—

Held, that the brine was a "mineral" within the meaning of the section, and that the mineral rights duty was therefore payable by the defendants on the rental value of the right so to work the brine.

Special Case stated by consent for the opinion of the Court pursuant to Rules of the Supreme Court, Order xxxiv., r. 1, and Order lxviii., r. 2, in an information by the Attorney-General on behalf of His Majesty, claiming a penalty which the Commissioners of Inland Revenue alleged the defendants, the Salt Union, Limited, had incurred by reason of their failure to give particulars as to the minerals (i.e. brine) worked on, in, or under certain land in Cheshire between October 1, 1912, and September 30, 1913.

The defendants are the owners of freehold land, including both surface and subjacent strata, at Winsford in the county of Chester, on which are works belonging to the defendants known as the Newbridge Works. On and in the land (which contains in superficial area between twelve and thirteen acres) are two vertical shafts which are used by the defendants for the purpose of pumping to the surface what is known as natural brine, i.e., water which has in the circumstances hereinafter described become fully saturated with salt in solution. The brine so pumped up, or the salt which (by evaporation of the water) is obtained therefrom, is put by the

defendants to commercial use. Persons who carry on operations such as those above described are known as "brine pumpers."

The question arose between the Commissioners of Inland Revenue and the defendants whether mineral rights duty under the Finance (1909-10) Act, 1910, was payable in respect of the brine so pumped up by the defendants.

On March 24, 1914, the secretary to the Commissioners gave to the defendants under s. 20, sub-s. 3, of the Finance (1909-10) Act, 1910, a notice in writing, dated March 23, 1914, which (omitting formal parts) was as follows:

"Mineral Rights Duty—Financial Year, 1913-14.

"With reference to the provisions of the Finance (1909-10) Act, 1910, the Commissioners of Inland Revenue hereby require you to make a return to them, within thirty-five days of the date of this letter, giving particulars as to the minerals (i.e. brine) worked on, in or under the land known as the Newbridge Works at Winsford, in Cheshire . . . . during the last working year, i.e., between the 1st October, 1912, and the 30th September, 1913 . . . . The only particulars of minerals worked which the Commissioners require are the number of gallons of brine which were pumped from the shaft or shafts in use on the works in question during the period above stated . . . ."

The defendants did not give to the Commissioners the particulars asked for, and on May 5, 1914, the writ herein was issued, the penalty thereby claimed being the penalty which the Commissioners alleged that the company had incurred by reason of its failure to give the particulars.

There are two main beds of rocksalt, namely, "the upper" and "the lower," in the Cheshire salt district (which district covers from 700 to 800 square miles at least). The upper bed is covered with a deposit of hard marl and the two beds are separated by a similar deposit, both deposits being when intact impervious to water. It has been ascertained by surface observations and experimental borings that breaks due either to faults or to denudation by glacial or other action occur in both beds.

It may properly be assumed that water has from a remote period of time found its way to the above-mentioned beds both at the

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outcrop of the overlying deposits and at points (which are unascertainable) where the deposits have become cracked through natural causes. In the result water now penetrates freely to, over, and through the salt strata by unknown and unascertainable channels or runs, and in passing over or through the strata it causes some of the salt particles to dissolve and becomes saturated with salt in solution, or, in other words, becomes "brine." Water is fully saturated with salt in solution when it contains 3 lbs. 2 oz. of salt to the imperial gallon, or 26 per cent. of salt. When fully saturated it cannot take up or carry any further salt in solution.

The object of the operations which are carried out by the defendants and other brine pumpers is by means of shafts or borings to tap the brine which has been formed as above mentioned and to pump it up to the surface.

It is impossible to ascertain without experimental borings whether brine which has been so formed will be found at any particular spot. It is also impossible to ascertain whence the brine which from time to time may be tapped at any particular spot has in fact come, or where its saturation has taken place; although it is possible to infer from the absence of surface subsidence that it has not come from, or been saturated within, the boundaries of particular land.

Certain predecessors of the defendants only ascertained by experimental borings that the brine was to be found within the land now owned by the defendants. It is not known, and it is impossible to ascertain, whence the brine has come, or where or when its saturation took place. There are, however, no surface subsidences within the defendants' land, and the brine is invariably found to be fully saturated. Accordingly the proper inference to be drawn is that the brine does not come from, and has not been saturated within, the boundaries of the defendants' land.

The question for the opinion of the Court was whether mineral rights duty was payable by the defendants on the rental value, as defined by s. 20 of the Finance (1909-10) Act, 1910, of the right to work the brine in or under the defendants' land.

Sect. 20 provides that "there shall be charged, levied, and paid for the financial year ending the thirty-first day of March nineteen hundred and ten and every subsequent financial year on the rental value of all rights to work minerals . . . . a duty (in this Act

referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value."

Sir F. E. Smith, A.-G., and *Sheldon*, for the informant. The brine is a mineral within the meaning of s. 20 of the Finance (1909-10) Act, 1910, and the mineral rights duty is therefore payable on the rental value of the right to work it. It is salt in solution and of the same nature as any other mineral in solution. The defendants are in possession of it and are trading with and make a profit from working it. They are therefore proprietors of it within the definition contained in s. 24 and within the meaning of the word " proprietor " in s. 20, sub-s. 2 (*b*). The judgment of Lord Salvesen in *Anstruther's Trustees* v. *Inland Revenue Commissioners* (1) is conclusive of the present case. *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (2) shows that the question is what is the meaning of the term " minerals " having regard to the context and to the purview of the particular statute in which it occurs. There is nothing in the Act of 1910 which shows that such a limitation ought to be placed upon the word " minerals " as would exclude salt in solution.

J. B. Matthews, K.C., and *Austen-Cartmell*, for the defendants. In *In re Dudley's Settled Estates* (3) it was held that brine was not a mineral within the meaning of the Settled Estates Act, 1877, and there is no ground for any distinction between the meaning of the word " minerals " in that Act and in the Finance (1909-10) Act, 1910. Unless a tax is imposed by clear and unambiguous words it ought not to be held to affect the subject: *Denn* v. *Diamond* (4); *Harris* v. *Birch* (5); *Doe* v. *Snaith* (6); *Reg.* v. *Barclay* (7); *Inland Revenue Commissioners* v. *Angus* (8); *Oriental Bank Corporation* v. *Wright*. (9) The Courts having in *In re Dudley's Settled Estates* (3) placed a particular construction on the word " minerals " in the year 1882, the subsequent legislation of 1910 must be read as employing the word with the same meaning. It is clear from the use of the word " proprietor " in s. 20, sub-s. 2 (*b*), that the Legislature had in view a mineral the subject of ownership. Water, whether it contains

(1) 1912 S. C. 1165.
(2) [1910] A. C. 116.
(3) (1882) 26 Sol. J. 359.
(4) (1825) 4 B. & C. 243.
(5) (1842) 9 M. & W. 591.
(6) (1832) 8 Bing. 146.
(7) (1881) 8 Q. B. D. 306.
(8) (1889) 23 Q. B. D. 579.
(9) (1880) 5 App. Cas. 842.

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salt or not, is a vagrant element which forms no part of the earth's crust, and the brine before it is sucked up cannot be said in ordinary language to be a mineral owned by the defendants. Nor can it be treated as "a separate parcel of the land" as required by s. 23, sub-s. 2. From that expression and the expression "the fee simple of the minerals" in s. 23, sub-s. 1, it is clear that the Legislature was not contemplating fluids as being included in the term "minerals." Nor could the brine be the "subject of a mining lease" within the meaning of s. 20, sub-s. 2 (*a*). A licence to work it could in no sense be called a lease. [*Hext* v. *Gill* (1), *Lord Provost of Glasgow* v. *Farie* (2), *Embrey* v. *Owen* (3), *Ballard* v. *Tomlinson* (4), and Johnson's, Jacob's, and the Encyclopedic Dictionaries were also referred to.]

Sir F. E. Smith, A.-G., in reply. No distinction can be drawn between water containing salt in solution and gas or oil which are the subject of proprietorship and can be tapped and collected. *Barnard-Argue-Roth-Stearns Oil and Gas Co.* v. *Farquharson* (5) shows that minerals may include oil and gas. Sect. 23, sub-s. 2, deals with valuation, and the expression "treated as a separate parcel of land" only means that minerals shall be valued in the same way as a separate parcel of land. The expression is only notional. Quicksilver is undoubtedly a mineral, but it could not be treated actually as a separate parcel of land. It is only to be notionally so treated for the purposes of valuation.

LUSH J., having stated the facts, continued: It has been contended on behalf of the defendants that the brine, being rocksalt in solution, is incapable of being treated as a mineral within the meaning of s. 20 of the Finance (1909-10) Act, 1910. What is and what is not included in the term "minerals" has been the subject of very much litigation, and *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (6) illustrates the kind of difficulty that has arisen. But the reported cases have mainly arisen under the Railways Clauses Consolidation Act, 1845, and it has been necessary in those cases to consider the object of the Legislature in passing the various

(1) (1872) L. R. 7 Ch. 699.
(2) (1888) 13 App. Cas. 657.
(3) (1851) 6 Ex. 353.
(4) (1885) 29 Ch. D. 115.
(5) [1912] A. C. 864.
(6) [1910] A. C. 116.

enactments comprised in that statute with reference to reservation by the company of the right to work mines and minerals, and also the context in the sections in which the expression "minerals" occurs. It is perfectly clear from *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (1) that the ground (referred to by Lord Gorell, among other of the learned Lords) upon which the House of Lords decided the question whether the particular substance in that case was or was not a mineral was mainly that it was necessary to ascertain and give effect to the object of the Legislature having regard to the context and the whole terms of the section in which the expression "minerals" occurs.

The word "minerals," freed from the limitations of any context, and without reference to any necessary restricting operation which must be imposed upon its meaning having regard to the object of the Legislature, is unquestionably wide enough to include not only those substances which are minerals for the purpose of the Railways Clauses Consolidation Act, 1845, but practically—as was laid down in *Anstruther's Trustees* v. *Inland Revenue Commissioners* (2)—all substances which can be obtained from the crust of the earth (other than the surface soil) by mining, quarrying, open working, or similar operations. The word is unquestionably wide enough to include a fluid and oil, as is illustrated by *Barnard-Argue-Roth-Stearns Oil and Gas Co.* v. *Farquharson.* (3) Therefore in considering what is included in the term "minerals" the word itself should receive, whether in construing this or any other Act, the widest possible meaning—i.e., as including all substances forming part of the crust of the earth which can be obtained, other than those on the surface, whether they are solid or in a state of solution. Salt saturated—salt in a state of solution—appears to be just as much a mineral (if one takes the word free from any of those restrictions which have been placed upon its meaning when it has been dealt with under other statutes) as oil or anything else which is obtained by working, quarrying, or otherwise.

On behalf of the defendants it was contended that the language of a taxing Act must be clear and unequivocal—that it must appear in clear and unequivocal terms that the subject was intended to be

(1) [1910] A. C. 116. (2) 1912 S. C. 1165.
(3) [1912] A. C. 864.

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taxed in respect of the working of the brine in order to include it in the taxing legislation. That proposition is true and has been enunciated very often, but after all it is necessary to construe the statute, and if one arrives at the conclusion that the language used, when construed according to the ordinary meaning of the terms employed, is wide enough to include this particular substance, effect must be given to it whether the statute is a taxing or any other Act. I do not attach much importance to that contention, because after all I have to ascertain what is or is not included in s. 20 of the Finance (1909-10) Act, 1910.

It was also contended on behalf of the defendants that there are authorities in which substances like brine have been held not to be minerals. In *In re Dudley's Settled Estates* (1), reported only, and very briefly, in the *Solicitors' Journal*—a decision of Hall V.-C. under the Settled Estates Act, 1877—the context in which the word "minerals" occurred included the words "stone or iron" or "other mines and minerals," and so far as it is possible to draw an inference it was decided that, having regard to the subject-matter with which the learned judge was dealing and to the context, the word "minerals" was not wide enough to include the particular substance in question in that case. I do not think that decision affords me the slightest assistance. I have to say whether this brine, for the purpose of this statute, is or is not a "mineral" within the meaning of the words "mineral rights," "the right to work the minerals," and within the meaning of the word "minerals" itself. In *Anstruther's Trustees* v. *Inland Revenue Commissioners* (2) the word "mineral" was construed as including every substance that came from the crust of the earth other than the surface soil, and I think that that wide interpretation is the only one which can be placed on the word "minerals" in the Finance (1909-10) Act, 1910, and that the word "minerals" in s. 20 must receive the same liberal construction as the Court placed upon it in *Anstruther's Case*. (2)

On behalf of the defendants Mr. Matthews rightly said that brine is not part of the land which is the property of the person working the minerals there. It is found in the case that it comes from lands other than those of the defendants—it is not saturated within the

(1) 26 Sol. J. 359. (2) 1912 S. C. 1165.

boundaries of their lands and does not come from those lands; and he contended that by the group of sections—s. 20 to s. 24—the Legislature must have contemplated cases in which the substance worked is capable of being the subject-matter of a demise, and as to which it could be predicated that the person working it owns the fee simple, is in a position to sell it, and can place a value upon the minerals. There is, no doubt, force in that contention, particularly having regard to s. 23. But nowithstanding this I have come to the conclusion that this brine is a mineral which is worked within the meaning of s. 20 and that the tax is properly enforceable in respect of it. Before it is pumped up by the defendants the brine—which is rocksalt in solution—is unquestionably in the land of the defendants. It is obtained from the defendants' land. It is not on the surface, but is obtained as part of the crust of the earth—quite true not in a solid form, but in solution; and it appears to me that, applying the proper test to the language of s. 20, this brine, which is worked by the defendants, is a mineral within the meaning of the section, and that the Crown is right in saying that the tax is payable in respect of it. There must therefore be judgment for the Crown.

Judgment accordingly.

Solicitor for informant: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Field, Roscoe & Co., for Forshaw & Hawkins, Liverpool.*

J. E. A.

1917
May 9.

LONDON CEMETERY COMPANY *v.* BARNES.

Revenue—Income Tax—Cemetery Company—Profits—Lump Sums for maintaining in Perpetuity Graves and Monuments—Deduction of Capital Value of Expenditure incurred—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60; *Sched.* (*A.*), *No. III.*

The appellants were a commercial and dividend-paying company owning and occupying two cemeteries of which they were the freeholders. They undertook in perpetuity the repair of graves and monuments, and the decoration of graves, upon payment of lump sums of money:—

Held, that in calculating the balance of profits upon which the appellants were liable to be assessed to income tax under No. III. of Sched. (A.), s. 60, of the Income Tax Act, 1842, there ought to be set against the lump sums not merely the sums annually expended by the appellants in the maintenance, repair, and decoration of the graves and monuments, but the capitalized value of the whole of the expenditure that the appellants might be estimated to incur in discharging the obligations in perpetuity in respect of which the lump sums had been paid.

Case stated by Commissioners for the General Purposes of the Income Tax Acts, under s. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19).

At a meeting of the Commissioners on June 5, 1913, the appellants, the London Cemetery Company, appealed against (inter alia) a first assessment for the year ended April 5, 1913, in the sum of 5000*l.* made under No. III. of Sched. (A.), s. 60, of the Income Tax Act, 1842, in respect of the profits derived by the appellants from their cemetery at Nunhead in the county of London. It was agreed that the assessment originally made should be reduced to 3411*l.* upon figures agreed between the appellants and the respondent (subject to the objection by the appellants to inclusion in the reduced assessment of the lump sums hereinafter mentioned), and the assessment was reduced from 5000*l.* to 3411*l.* accordingly.

The appellants are a commercial and dividend-paying company incorporated in the year 1836 by statute (6 & 7 Will. 4, c. cxxxvi.). They own and occupy two cemeteries, one of which is at Nunhead, and of which they are the freeholders.

In respect of the profits received in connection with the Nunhead

Cemetery they were assessed to income tax under No. III. of Sched. (A.), s. 60, of the Income Tax, Act, 1842, by a first assessment for the year ending April 5, 1913, in the sum of 5000*l.*, reduced to 3411*l.*, as above stated.

The company, acting under the powers conferred upon them by the Act of 1836, carry on cemeteries for the interment of the dead, including the sale of exclusive rights of burial in the cemeteries, either in perpetuity or for a limited period, the excavation and reopening of graves, turfing and maintaining graves, the sale of plants or shrubs for the decoration thereof, and the supply of marble and memorial tablets and the cutting of inscriptions thereon.

In the course of their conduct of their cemetery at Nunhead they have for some years past undertaken and habitually undertake by deed to maintain in perpetuity in good and substantial repair graves and the monuments erected thereon, and also the decoration of graves in perpetuity, upon payment of certain "lump sums" of money. Contracts between the company and the persons paying the lump sums for the above-mentioned purposes were entered into daily.

The form of contract (so far as material) was as follows: "We the London Cemetery Company . . . . in consideration of the sum of . . . . do hereby undertake to maintain in perpetuity in good and substantial repair . . . ." (then followed the subject-matter of the contract).

In computing the amount of 3411*l.* there had been included in the gross receipts the amount of 745*l.* in respect of the lump sums received by the appellants for the year ending April 5, 1913, and the expenses for the upkeep of the graves, 86*l.*, was allowed against the gross receipts.

The appellants admitted that they were not bound, except for their own protection, to invest the lump sums or any portion of them, but the estimates made by them to enable them to arrive at the amount payable for the lump sums were based upon the assumption that these lump sums would be invested. They invest the whole of the lump sums, and the interest derived therefrom is applied to the expenses of fulfilling the contracts in respect of which the lump sums are received. The appellants contended before the Commissioners (inter alia) that the lump sums should not be

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included as annual income for the purposes of assessment to income tax, having been paid to the appellants as a consideration to meet the obligations for keeping up the graves in perpetuity, and referred to *Sun Insurance Office* v. *Clark* (1), and that if and so far as *Paisley Cemetery Co.* v. *Reith* (2) applied to the present case it was inconsistent with and overruled by *Sun Insurance Office* v. *Clark*. (1)

The respondent (the surveyor of taxes) contended (inter alia) that *Paisley Cemetery Co.* v. *Reith* (2) was conclusive and had not been overruled, and that *Sun Insurance Office* v. *Clark* (1) had no application to the present case.

The Commissioners decided that the "lump sums" were liable to be included in the computation of the company's profits for the purpose of assessment to income tax, and confirmed the assessment, but reduced it from 5000*l.* to the agreed sum of 3411*l.*

Ryde, *K.C.*, and *T. T. Paine* (for *E. M. Konstam*), for the appellants. The lump sums ought not to be brought into account upon one side without bringing in on the other side the value of the consideration given by the appellants. If *Paisley Cemetery Co.* v. *Reith* (2) is applicable to the present case it is inconsistent with and overruled by *Sun Insurance Office* v. *Clark*. (1) [*Usher's Wiltshire Brewery* v. *Bruce* (3) was also referred to.]

Sir F. E. Smith, *A.-G.*, and *T. H. Parr*, for the respondent. *Sun Insurance Office* v. *Clark* (1) is completely inapplicable to the present case. There is no analogy between the business of an insurance company and that of a cemetery company. The question is whether the lump sums are income or capital. They are trade receipts. There is no means of arriving at an actuarial calculation of the capitalized value of the expenditure the appellants may incur in discharging their obligations in perpetuity. In *Edinburgh Southern Cemetery Co.* v. *Kinmont* (4) there was nothing to be done by the cemetery company.

Ryde, *K.C.*, in reply. The appellants do not contend that the lump sums are capital. They are income, but against them must be placed the cost incurred by the appellants in earning them. If the appellants instead of doing the work themselves had employed

(1) [1912] A. C. 443.
(2) (1898) 25 R. 1080.
(3) [1915] A. C. 433.
(4) (1889) 2 Tax Cas. 516.

a sub-contractor for a smaller lump sum they would have been entitled to deduct the sum paid to the sub-contractor from the lump sums. Therefore, for the purpose of calculating the balance of the appellants' profits there ought to be set against the lump sums not merely the sums annually expended in the maintenance, repair, and decoration of graves and monuments, but the capitalized value of the whole of the expenditure that the appellants may be estimated to incur in discharging the obligations in perpetuity in respect of which the lump sums have been paid. The present case is not distinguishable from *Sun Insurance Office* v. *Clark*. (1)

LUSH J., having stated the facts, continued: The question is whether the whole of the moneys paid in the course of one year by the persons who contract with the appellants are to be treated as income assessable to income tax under the Income Tax Acts. On behalf of the Crown it is contended that the moneys are to be treated wholly as income assessable to income tax; the appellants, on the other hand, contend that, although the moneys are income, the whole of them are not assessable income, because the appellants will necessarily have to pay other sums of money and discharge certain burdens in consideration of the payments of the lump sums; and that therefore the true income which is assessable is the profit made by the appellants in respect of those payments, having regard to the moneys that the appellants will have to pay in order to earn this income.

Now, apart from authority, I think that the contention on behalf of the appellants is right. It does not seem possible to hold that when the company receive a sum of money in consideration of their undertaking to discharge certain burdens and render certain services which will entail expense to them they are receiving the whole of the money by way of profit in their business. Suppose that instead of the appellants undertaking to render services they were a trading company which undertook to supply goods, indeterminate in quantity and value, in consideration of the payment of a lump sum which they received in advance. It may be—it often is—very difficult to ascertain what the true estimate is of the moneys that the trading company will have to pay in consideration of the lump sum pay-

(1) [1912] A. C. 443.

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ment. But an estimate must be arrived at, because that which the company earn in the result is the difference between the lump sum that they receive and the moneys that they will have to expend in order to earn the money paid them. If there were no authority to guide me I should not have felt any difficulty in holding that the appellants are right in their contention that although these lump sum payments are no doubt income as opposed to capital, yet they are not in their entirety income assessable to income tax. If the burden were undertaken by the appellants for a limited term of years instead of in perpetuity, I do not think there could be any doubt that the whole payments received would not be assessable income. In my judgment it makes no difference in principle that the appellants undertake the burden in perpetuity instead of for a limited number of years. That fact may make the estimate more difficult to arrive at, but in principle it seems to me it makes no difference whether the company undertake to keep the graves in repair and to render the stipulated services for one year, ten years, or in perpetuity. Therefore, apart from authority, I think that the contention of the appellants is right.

But on behalf of the Crown the decision in *Paisley Cemetery Co.* v. *Reith* (1) was relied on, and I confess I do not see any way of distinguishing that case from the present one. It seems to me that the point I have now to decide was decided by the Court in Scotland in the *Paisley Cemetery Case* (1) in favour of the present contention on behalf of the Crown. In order to see exactly what the ground was upon which that case was decided I think it is necessary to refer to *Edinburgh Southern Cemetery Co.* v. *Kinmont* (2), upon which the learned Lord President in his judgment in the *Paisley Case* (1) relied, because it has been cited in argument on behalf of the Crown, and the Lord President in his judgment in the *Paisley Case* (1) said: "We should be going against the theory of the cases which have already been decided, and against decisions which are well recognised, if we were to give countenance to that idea,"—that is, the idea that the whole of the payments (slump sums, as they were called) were not assessable.

In *Edinburgh Southern Cemetery Co.* v. *Kinmont* (2) the cemetery company sold the use of certain grave spaces in the cemetery to be

(1) 25 R. 1080, 1084. (2) 2 Tax Cas. 516.

used for burial purposes only, and the sole question there was whether deductions ought to be allowed in respect of the estimated cost price of the grave spaces. It is important to observe that in his judgment in that case the Lord President referred to the earlier case of *Coltness Iron Co.* v. *Black* (1), and in pointing out the question which was involved in that case said (2): "The great demand which was made upon the part of the Coltness Iron Company was that they should be allowed a deduction in respect of the constantly recurring expense of making new pits as being a proper deduction from their income, and that was disallowed." He then referred to a passage in his own judgment in that case dealing with the contention, and pointed out that his view in that case had been that the working expenses in respect of which a deduction was allowed did not include the expenses which the company sought to have deducted. The foundation of the judgment in *Edinburgh Southern Cemetery Co.* v. *Kinmont* (3) was that, inasmuch as certain sites were sold by the company, it was not right to allow the deductions which the company sought to have allowed from the income which they were receiving.

In *Paisley Cemetery Co.* v. *Reith* (4) it appears that the company received certain slump sums (as they were called) in commutation of the annual charge for the upkeep of lairs in perpetuity —very much like that which has happened in the present case— and the question was whether those sums ought to be deducted in arriving at the profits of the company for assessment. The appellants contended that they ought to be relieved in respect of a certain sum of 36*l.*, and that the slump payments which the company received ought to be regarded as trust funds devoted by them to a specific purpose incapable of being appropriated to the ordinary purposes of the company, and were properly treated as capital; that they were not in any sense profits divisible among the members of the company; and that all that was subject to assessment was the annual interest derived from the money. The contention on the part of the Crown was that the slump sums received and invested as well as the annual interest were assessable on the same principle as in the case of the sums received for the price of lairs sold in the

(1) (1881) 6 App. Cas. 315.
(2) 2 Tax Cas. 526, 527.
(3) 2 Tax Cas. 516.
(4) 25 R. 1080, 1084.

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Edinburgh Case (1), and were taxable both as regards the principal amount without deduction for the sum carried to sinking fund and the annual interest produced. The learned Lord President held that the Court would be going against the theory of the decided cases if they were to give countenance to the contention on behalf of the company, and that "the case is exactly the same as the ordinary one of money paid down with an obligation to provide for certain expenses in the future, and it seems to me that the judgment which was pronounced by the Commissioners was right, and ought to be affirmed."

I am of course not bound by the decision in the *Paisley Case* (2), and I confess with the very greatest respect that I cannot see how the case of a cemetery company selling its sites for use in perpetuity, as in the *Edinburgh Case* (1), is the same as that of a cemetery company which charges certain sums to clients or customers in consideration of the company undertaking to keep in repair and decorate the graves and render the other services which the appellants undertake. It seems to me that in a case like the present the true profit earned by the appellants is the profit which remains when they have discharged and met the expenditure they have undertaken to discharge and meet in consideration of the payments, and although—as the appellants admit—the sums received are income and not capital, yet it would be wrong to treat the whole of the moneys received as profit or money earned; but against the payments which the appellants receive ought to be set off the expenses they will incur in order to earn the money so paid.

I am not left entirely to my own view of the decision in *Paisley Cemetery Co.* v. *Reith* (2), as I have the aid of *Sun Insurance Office* v. *Clark* (3), a decision of the House of Lords. On behalf of the appellants it has been contended that the principle laid down in that case—although the facts were very dissimilar to those in the present one—is inconsistent with the decision of the Scotch Court in the *Paisley Case* (1) and is sufficient to support the contention on behalf of the appellants in the present case. In *Sun Insurance Office* v. *Clark* (3) the insurance company charged premiums for insurance against fire in the ordinary way, and the question was whether the

(1) 2 Tax Cas. 516. (2) 25 R. 1080, 1084.
(3) [1912] A. C. 443.

full amount received by the company by way of premiums—the best estimate of what the insurance company would or might have to pay in the future if there was a loss having been arrived at—was assessable to income tax or whether the true profit for the purpose of assessment of income tax was, not the whole premiums, but the profit which the company earned after setting off against the premiums the expenses they would have to pay in order to earn them. It is quite true that the business of an insurance office is very different in its nature from that of a cemetery company, because an insurance company when it receives a premium cannot tell whether there will be any loss in respect of that policy or not; but if the business of an insurance company is taken as a whole it is absolutely necessary to anticipate that there will be losses which the insurance company will have to meet, and in consideration of which the premiums are received. In my judgment the opinions of Earl Loreburn L.C. and the other law lords show that the principle which the House of Lords held must be acted upon in that case applies to the present case; and it seems to me to follow that, whether the business is that of an insurance company or of a cemetery company undertaking, as the appellants do, burdens in perpetuity, it is not sound or right to say that the whole of the moneys which are received are assessable to income tax. One has, as I have said, to ascertain as best one can by way of estimate what will be expended by the company in order to earn these moneys, and that which remains after deducting one from the other will be the profit assessable to income tax. That is a task I do not propose to undertake. The proper course will be to allow the appeal and remit the case in order that the true income may be ascertained.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Baker, Blaker & Hawes.*

J. E. A.

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May 16.

THE KING *v.* THE ARMY COUNCIL.
Ex parte RAVENSCROFT.

Military Law—Court of Inquiry—Irregular Proceedings—Mandamus—Jurisdiction—Appropriate Remedy available—Discretionary Power—Ineffective Remedy—Courts of Inquiry Regulations, No. 124 (*E*) *and* (*F*)—*Army Act*, 1881 (44 *&* 45 *Vict. c.* 58), *s.* 42.

By the regulations made under s. 70 of the Army Act for holding military courts of inquiry it is provided that previous notice should be given of the time and place of the meeting of a court of inquiry, and of all adjournments of that court, to all persons concerned in the inquiry; and that whenever any inquiry affects the character or military reputation of an officer, full opportunity must be afforded to the officer of being present throughout the inquiry.

An officer, whose conduct was brought before a court of inquiry by the order of a general officer in command, complained that the above regulations had not been complied with, and that as the result of evidence given before the court he had been ordered by the Army Council to revert to half-pay. He applied to the Army Council, who refused to reopen the matter. He then obtained a rule nisi for a mandamus to the Army Council commanding them to cause the court of inquiry to reassemble to hear and determine his case according to law:—

Held, that the rule must be discharged, because (1.) the Court will not intervene in matters relating to military law prescribing rules for the guidance of officers; (2.) another and an equally appropriate remedy was open to the officer under s. 42 of the Army Act; (3.) the power of the Army Council to assemble a court of inquiry is a discretionary power, and the Court will not order an authority to exercise a discretion in a particular way; (4.) the remedy by mandamus, if available, would in the circumstances be ineffective.

Dawkins v. *Lord Rokeby* (1866) 4 F. & F. 806 and *Marks* v. *Frogley* [1898] 1 Q. B. 888 approved and applied.

Rule Nisi for a mandamus to the Army Council commanding them to cause a court of inquiry to reassemble to hear and determine according to law the case of Major and Honorary Lieutenant-Colonel Herbert Valentine Ravenscroft, of the 3rd Border Regiment, on the grounds (1.) that Colonel Ravenscroft was condemned without his defence being fully heard, and (2.) that the statutory rules of procedure governing courts of inquiry were not complied with. (1)

(1) See note on p. 515, post.

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The following statement of facts is taken substantially from the judgment of the Lord Chief Justice :—

The prosecutor, Colonel Ravenscroft, is an officer whose conduct with other officers formed the subject of inquiry by a court of inquiry. There had been at some time in 1916 in France certain complaints with regard to excessive drinking by officers of the regiment to which he belonged. In July, 1916, a court of inquiry was held in the trenches in France. As the result of evidence there given a court of inquiry was held at Conway, where the battalion was stationed, having returned from France. This court was ordered to be held by command of the general officer commanding the troops in the Western Command. The court met on September 5, 1916, in the presence of the prosecutor and of another colonel whose conduct was impugned in this connection. It heard the evidence of eight witnesses, four of whom were cross-examined by the prosecutor. The court then adjourned till the next day, when seven witnesses were called and the procedure of the day before was repeated. The prosecutor was then told, according to his account, that he would have an opportunity of calling witnesses and making a statement. That is not assented to by the president of the court, who differs to some extent from this account, but, for the purposes of this case, not very materially. On September 7 the court reassembled for the purpose of examining the mess bills, and having done so came to this conclusion that, " owing to the seriousness of the case and of the conflicting evidence given by several officers, the evidence should be taken on oath and that the officers who gave evidence before the court of inquiry in France should be directed to come to this country to give evidence before this court to substantiate the statements there made and to give the officers now involved an opportunity of cross-examining those witnesses under Rule of Procedure 124. The court considers that the evidence of the witnesses from France is essential and that no definite finding on the whole case is likely to be arrived at without these witnesses, and for these reasons the court decides to adjourn pending further instructions." The court reassembled on September 12 and proceeded to examine the wine books, and after hearing some slight evidence of an unimportant character they made this additional finding :—" The court, having reassembled according to order,

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and having re-examined the mess books and having taken the ten highest wine bills of every month, consider that the amounts shown underlined in red ink in the attached schedule marked B are excessive. Some of the other wine bills appear to be high, though not excessive." Some of these items relate to the prosecutor. Neither on the 7th nor on the 12th was the prosecutor present, and he says that he had no notice of either of these sittings. According to the account of the presiding officer notice was ordered to be given, and telephonic communications conveyed to the court that according to the convening officer's information the prosecutor did not intend to be present. The convening officer is dead. The prosecutor denies that he ever received notice or that he ever stated or gave authority to any one to say that he did not intend to be present, and this Court naturally accepts that statement.

The court of inquiry never finally reported. The recommendation that the officers should be brought from France was considered by the responsible military authority, who, on consideration of the evidence of the fifteen witnesses given on September 5 and 6 in presence of the prosecutor and subject to his cross-examination and to his calling evidence if he wished to do so, and acting also on other information in possession of the military authorities, determined that the prosecutor should revert to retired pay. The prosecutor did all in his power to reopen the inquiry; he communicated with the Army Council, who reported that their decision was final. In consequence of the failure of his efforts the prosecutor applies to this Court.

A rule nisi having been obtained as above stated,

Sir Frederick Smith, *A.-G.*, and *Branson* showed cause. This application for a mandamus is misconceived.

1. This Court will not intervene in matters relating to military law and discipline: *Dawkins* v. *Lord Rokeby* (1); *Dawkins* v. *Lord Paulet* (2); *Marks* v. *Frogley*. (3)

2. Another and a more appropriate remedy is open to the prosecutor, namely, that prescribed by s. VIII. of the King's Regulations and s. 42 of the Army Act. (4)

(1) 4 F. & F. 806.
(2) (1869) L. R. 5 Q. B. 94.
(3) [1898] 1 Q. B. 888.
(4) See note on p. 515, post.

3. The Army Council had nothing to do with the assembling of the court of inquiry. That court was convened by the general officer commanding in the Western Command, and not by the Army Council. The Army Council have no control or supervision over the procedure of a court of inquiry not convened by them, and owe no duty, if they have the power, to order the court to reassemble.

4. The Army Council has power under 124 (B) of the Regulations for Courts of Inquiry to convene a court of inquiry; but that is a discretionary power, and this Court will not order an authority to exercise its discretion in a particular way.

5. There are other reasons peculiar to this case why this Court, if it has the power to issue a mandamus, should refuse to do so. The Army Council are not bound to act solely on information supplied by a court of inquiry. They may act on other information at their disposal. Therefore this mandamus, if granted, may prove an ineffective remedy. Again, the court of inquiry expressed the opinion that officers should be brought from France to give evidence on oath. If military exigencies at the front should make such a course impossible this remedy would be equally ineffective.

Hume Williams, K.C., and *R. D. Muir*, in support of the rule. The Regulations for Courts of Inquiry have the force of statute. Regulation 124 has not been complied with. No notice of the adjourned sittings of the court of inquiry on September 7 and 12 was given to the prosecutor as prescribed by paragraph (E), nor was opportunity afforded him of being present throughout the inquiry as prescribed by paragraph (F) of that regulation. A writ of habeas corpus has issued where an officer was imprisoned by a court-martial and there was an informality in the order committing him to prison: *In re Allen.* (1) This is not a matter of military discipline, but a question whether the statutory provisions for insuring a fair hearing when an officer's honour and rank are concerned are to be observed or ignored. When a public or quasi-public legal duty incumbent upon a person or an authority has not been performed and performance cannot be enforced by any other adequate legal remedy, the prerogative writ of mandamus issues: Short and Mellor, Crown Office Practice, 2nd ed. (1908), p. 197.

Sir Frederick Smith, A.-G., replied.

(1) (1860) 30 L. J. (Q.B.) 38.

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VISCOUNT READING C.J. Colonel Ravenscroft obtained a rule nisi for a writ of mandamus directed to the Army Council commanding them to cause a court of inquiry to reassemble and to hear and determine the case made against him according to law. He bases his application upon two grounds—first, that he was convicted without his defence being properly heard, and, secondly, that the statutory rules relating to the constitution and proceedings of the court of inquiry were not complied with. When this Court granted the rule nisi it intimated that it was not to be taken as deciding that it had any jurisdiction to issue the writ to the Army Council. The Attorney-General has appeared to show cause against the rule and has taken three points. First, he raised an important point of general application to military matters, namely, that the civil Courts will not intervene in matters relating to military law and discipline and that this Court could not issue a writ of mandamus in the circumstances. Secondly, he contended that the Army Council was not the authority which had convened the court of inquiry and that there was no obligation upon them to convene a court now. Thirdly, that in any event the prosecutor had another remedy at least equally convenient and appropriate which he ought to have pursued.

As to the first point, I have no doubt that this Court has no power to interfere with matters of military conduct and purely military law affecting military rules for the guidance of officers or discipline generally. I agree with what was said by Willes J. in *Dawkins* v. *Lord Rokeby* (1): "It is clear that, with respect to those matters placed within the jurisdiction of the military forces, so far as soldiers are concerned, military men must determine them." And later he said: "With respect to persons who enter into military state, who take Her Majesty's pay, and who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do, by a compact which is intelligible, and which requires only the statement of it to recommend it to the consideration of any one of common sense, become subject to military rule and military discipline." That is not only an opinion which binds this Court, inasmuch as it has been followed in other cases; but if I had to arrive at a conclusion independently of that case my

(1) 4 F. & F. 806, 831.

investigations would have led me to the same result. It is impossible for this Court to intervene here. To do so would make the military law dependent upon the civil Court. There are regulations prescribed and means of seeking redress provided in case of wrong inflicted by a superior upon a subordinate officer, and the essence of the acceptance of a commission in the Army is that the person makes himself amenable to military law and accepts the decision of the military authorities when charges of infringement of military law are brought before them. An authority for that is *Marks* v. *Frogley*. (1) I agree that the actual decision in that case, like the decision in *Dawkins* v. *Lord Rokeby* (2), was not upon the particular question before us, but it contains passages upon the general law which serve to guide us in the present case. A. L. Smith L.J. said (3): "I find in the judgment of Lush J. in *Dawkins* v. *Lord Paulet* (4) some remarks in connection with the articles of war, of which this section"—s. 43 of the Army Act—"is the equivalent, which appear to me to be such sound sense and good law that I will repeat them. He says: 'Can it be reasonably inferred that any other mode or measure of redress was intended by the Act than that which is specified in this article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. That defect, it if be one, is a defect in the code itself which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates both the right and the remedy, and this Court cannot add to the one or to the other.'" Chitty and Collins L.JJ. concurred, and Kennedy J. in the Court below took the same view of the law, but thought that on the facts the plaintiffs had ceased to be under military law at the time when the alleged wrongful acts were committed. On these principles we have to consider the present case. In order to see how they apply I propose to state very briefly the material facts. [The Lord Chief Justice stated the facts as above and proceeded:]

It is to be observed that the complaint of the prosecutor before this Court is that he had no notice of the reassembly of the court of

(1) [1898] 1 Q. B. 888.
(2) 4 F. & F. 806.
(3) [1898] 1 Q. B. 899.
(4) L. R. 5 Q. B. 94, 121.

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inquiry, and therefore no opportunity of cross-examining the witnesses and giving his own explanation. These matters would be very relevant if we were considering the procedure of a civil Court. He relies on the Regulations for Courts of Inquiry, which, as he says, have been infringed. Those regulations are made by the Secretary of State under powers conferred upon him by s. 70 of the Army Act, and it is stated in regulation 124 (E) and (F) that "Previous notice should be given of the time and place of the meeting of a court of inquiry, and of all adjournments of the court, to all persons concerned in the inquiry"; and "Whenever any inquiry affects the character or military reputation of an officer or soldier, full opportunity must be afforded to the officer or soldier of being present throughout the inquiry, and of making any statement and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation, and producing any witnesses in defence of his character or military reputation." It is because these two rules of procedure have not been fully complied with that the prosecutor insists that he is entitled to redress in a civil Court. My difficulty has been to discover any breach by the Army Council of any legal obligation imposed upon the Army Council which the prosecutor has any legal right to enforce. It is fundamental when the writ of mandamus is asked for that we should find some refusal or failure by the Army Council to perform its duties. Mr. Hume Williams was asked to point out the duty which the Army Council had failed or refused to perform. I have not yet heard the answer. It is said that the Army Council has power to direct the court of inquiry to reassemble, and that therefore this Court, when it finds that the rules of procedure have not been followed, should direct the Army Council to reassemble the court, which means that this Court is to command the Army Council to exercise its discretionary power of ordering the reassembly of the court of inquiry. The Army Council has exercised its discretion in refusing to reopen the matter. This Court cannot command the Army Council to exercise its discretion in a particular way. It appears to me that this is a military matter. The prosecutor was under military law. His complaint, if any, is against his superior officer who directed the convening of the court of inquiry and the

officer who in his view wronged him by not giving him a proper opportunity of presenting himself on the last two occasions when the court of inquiry met. Agreeing as I do with all that has been said by learned judges in the past, I should be prepared to decide this case upon that ground. I do not, however, wish to be taken as deciding that in no circumstances could this Court issue a writ of mandamus to the Army Council even on proof of a breach of duty which the applicant had a right to enforce. Upon so important and far-reaching a proposition of law I desire to reserve my opinion.

I am further of opinion that this writ of mandamus ought not to issue even if the first point was decided in favour of the prosecutor, because another remedy equally convenient, beneficial, and appropriate was open to him. He could have complained under s. 42 of the Army Act to the Army Council, who are thereby required to examine into the complaint and through the Secretary of State to make a report to His Majesty in order to receive the directions of His Majesty thereon. Once it is established that such another remedy is open it follows that this Court will not issue a writ of mandamus.

Furthermore, the Court will not grant the writ unless it is satisfied that the remedy will be effectual. If I am right in my view that the Army Council could consider other information in their possession on these military matters, it cannot be said that the reassembling of the court of inquiry would afford an effectual remedy ; it would still be open to them to decide as they have decided upon information derived from other sources. I may add that this Court would not order the Army Council to reassemble in order to bring home officers from the field in France to give evidence upon this matter.

In any case, this Court would be slow to interfere where the complaint is that the rules of procedure have not been strictly followed. The issue of the writ of mandamus is in the discretion of the Court. It is not a matter of right. The evidence produced by the military authorities satisfies me that they acted not upon the events of the last two days, September 7 and 12, or upon the report of the court of inquiry, which was never final in any sense, but that they acted upon the evidence collected upon September 5 and 6, and upon all the information at their disposal. In these circumstances it would not be right to grant the writ solely upon the ground that the rules

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of procedure were not strictly complied with on the 7th and 12th. I do not mean in any way to intimate that an officer accused of any matter affecting his reputation or character ought not to have the fullest opportunity of being heard, but merely that in the circumstances of this case the discretion of the Court cannot be exercised in favour of the prosecutor. I am satisfied that this application is made with the object of reopening in some form or other the decision arrived at by the Army Council. It is in substance an appeal from that decision, and the alleged infringements of the rules of procedure merely serve as the grounds upon which the appeal is based. I express no view upon the facts of the case, but concern myself solely with the propositions of law which we have been invited to consider. In my opinion the rule must be discharged.

RIDLEY J. I am of the same opinion. I think it very important to recognize fully the rules laid down by A. L. Smith L.J. in *Marks* v. *Frogley* (1), which are really adopted from *Dawkins* v. *Lord Rokeby* (2) and other cases previously decided. Civil Courts cannot be invoked to redress grievances arising between persons both of whom are subject to military law. The same doctrine is expressed in *Keighly* v. *Bell.* (3)

In my view, though the point has not been thoroughly argued, no mandamus will lie to the Army Council to bid them act in a particular way in any matter of military discipline, any more than it would have done or ever did to the Commander-in-Chief before 1904 (4) Those matters are entirely in their hands. If there be a particular duty imposed by statute which must be obeyed implicitly and which allows no scope for discretion,

(1) [1898] 1 Q. B. 888.
(2) 4 F. & F. 806.
(3) (1866) 4 F. & F. 763.
(4) The office of Commander-in-Chief ceased to exist in the early part of 1904, and the Patent creating the Army Council (February 6, 1904) transferred to that body among other powers the prerogative powers of the Crown in relation to the Army theretofore exercised by the Secretary of State, the Commander-in-Chief, and other principal officers. By the Army (Annual) Act, 1909 (9 Edw. 7, c. 3), there were transferred to the Army Council all the powers of the Commander-in-Chief and the Adjutant-General under the Army Act and various other statutory duties: see Manual of Military Law (1912), pp. 161, 163.

matters assume a different aspect. No such matter arises here. This is unquestionably a matter of military discipline. That is established beyond doubt by the affidavits in this case, and particularly by the affidavit of General Childs, who states that his decision that the prosecutor should no longer be employed on active service was arrived at by him and concurred in by the Adjutant-General upon all the information in his possession, and not upon the evidence given before the court of inquiry alone. I agree for the reasons given by my Lord that the rule should be discharged.

AVORY J. I agree that this rule should be discharged for the special reasons applicable to this particular case which have been given by my Lord; but, as the Crown has invited us to decide the matter on a broader basis, I think it right to say that I concur in the general principle already expressed by the other members of the Court. In a matter affecting the discipline of the Army this Court cannot interfere by mandamus, prohibition, or certiorari, at the suit of an officer or soldier, with the proceedings of a military court of inquiry or with any action that may thereupon be taken by the Army Council.

There are many passages in the judgment of Willes J. in the case of *Dawkins* v. *Lord Rokeby* (1) which may be quoted beyond those which have been referred to. He says (2): "The reading of the oath of the court at court-martial, out of article 102, which has been referred to in the course of the case, is abundant to show, with respect to all matters which come under the cognizance of the military tribunals, they are subject to a test of law which is different from that administered in civil Courts; it is to be according to military usage and their approval." He goes on to refer to the case of *Johnstone* v. *Sutton* (3) in the House of Lords, and says: "Not only in the case of *Johnstone* v. *Sutton* (3) was it shown that military matters, properly brought within the true limits of military jurisdiction, are not to be called in question in civil Courts; but also in a subsequent case, in the last century, of *Grant* v. *Gould* (4) it was laid down, upon an application for a prohibition, that a man, by becoming a soldier, and receiving the Queen's pay, does agree

(1) 4 F. & F. 806.
(2) Ibid. 831, 832.
(3) (1786) 1 T. R. 510.
(4) (1792) 2 H. Bl. 69.

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and consent that he shall be subject to military discipline, and he cannot appeal to civil Courts to rescue him from his own compact. . . . . It is not competent for this Court to undo that which Her Majesty has done, upon the advice of the proper authorities in these matters." He goes on to refer to one of the Articles of War which at that date, in 1866, afforded redress in such a case, providing that if any officer shall think himself wronged by his commanding officer, and upon due application shall not receive the redress which he is entitled to, he is to make his complaint in the manner there pointed out and he is to seek redress in that manner. Willes J. proceeds (1): "I cannot entertain a doubt that this is the law; whatever responsibility may attach to me for pronouncing it, I must pronounce it, as I am satisfied that it exists." There follows a passage which may be appropriate to the case before us: "Nor ought I to allow any feeling of sympathy for Colonel Dawkins, even if I felt it, to interfere with the discharge of my plain duty, —that is, to abstain from matters with which I have no concern." There is also a passage from the judgment of Cockburn C.J. in *Reg.* v. *Lords Commissioners of the Treasury* (2) which is in point. The Lord Chief Justice said: "It is not because there is no other remedy but that which may be a fruitless and abortive one, that this Court has jurisdiction to issue a writ of mandamus. I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction." In this case the real complaint which is made is that one of the Regulations for Courts of Inquiry under letter (F) has not been complied with. In my opinion, if that is so, and for the reasons I have given it is not necessary to express any opinion whether it be so or not, the remedy is by complaint to the superior officer who has command and control over these proceedings, and ultimately

(1) 4 F. & F. 833.
(2) (1872) L. R. 7 Q. B. 387, 394.

under s. 42 of the Army Act which corresponds to the Article of War in force in 1866.

For these reasons I agree that the rule should be discharged.

Rule discharged.

Solicitors for prosecutor: *Norton, Rose & Barrington.*
Solicitor for the Army Council: *The Treasury Solicitor.*

NOTE.—The Army Act, s. 70, sub-s. 1: "Subject to the provisions of this Act His Majesty may, by rules to be signified under the hand of a Secretary of State, from time to time make, and when made repeal, alter, or add to, provisions in respect of the following matters or any of them; that is to say, (*a*) The assembly and procedure of Courts of Inquiry; . . . ."

Regulations for Courts of Inquiry, other than Courts of Inquiry held under s. 72 of the Army Act:—

124: "(A) A Court of Inquiry is an assembly of officers directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them.

"(B) A Court of Inquiry may be assembled by the Army Council or by the officer in command of any body of troops, whether belonging to one or more corps. . . . ."

"(E) Previous notice should be given of the time and place of the meeting of a Court of Inquiry, and of all adjournments of that Court, to all persons concerned in the inquiry.

"(F) Whenever any inquiry affects the character or military reputation of an officer or soldier, full opportunity must be afforded to the officer or soldier of being present throughout the inquiry, and of making any statement and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation. . . . ."

"(J) The Court may be reassembled as often as the authority who assembled the Court may direct, for the purpose of examining additional witnesses, or further examining any witnesses, or recording further information. . . . ."

King's Regulations and Orders for the Army. Section VIII., Discipline, Courts-Martial, &c.:—

"439. The manner in which an officer or soldier should proceed to obtain redress for any grievance under which he conceives himself to be suffering is prescribed in ss. 42 and 43 of the Army Act and the notes thereto in the Manual of Military Law. An officer or soldier may also make any complaint to an inspecting general officer as laid down in para. 128. These methods of complaint will alone be recognized, and an officer or soldier is forbidden to use any other method of obtaining redress for a grievance, real or supposed. . . . ."

Army Act, s. 42: "If an officer thinks himself wronged by his com-

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REX v. ARMY COUNCIL. RAVENSCROFT, *Ex parte.*

manding officer, and on due application made to him does not receive the redress to which he may consider himself entitled, he may complain to the Army Council in order to obtain justice, who are hereby required to examine into such complaint, and through a Secretary of State make their report to His Majesty in order to receive the directions of His Majesty thereon."

W. H. G.

1917

May 22.

CHEATER *v.* CATER.

Nuisance—Landlord and Tenant—Overhanging Trees—Lessor's Duty to Lessee.

A landlord let a farm to a tenant, retaining in his own possession adjoining land on which was a shrubbery containing yew trees so near the farm as to overhang the boundary and during the tenancy to come within reach of the tenant's cattle and horses. The tenant's mare ate of the yew trees and died :—

Held by Lord Coleridge J., that the landlord was liable within the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330 ; distinguishing the dictum of Mellish L.J. in *Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756, 761, that a lessee takes the land as he finds it, on the ground that the dictum only applies to the land as it existed at the commencement of the tenancy.

Held by Rowlatt J., following the dictum of Mellish L.J., that the landlord was not liable.

APPEAL from the county court of Gloucestershire holden at Cirencester.

The plaintiff was tenant to the defendant of a farm held upon a yearly tenancy from September, 1914. One of the fields of the farm adjoined land in the occupation of the defendant and separated from it by a fence. On the defendant's land about 3 feet from the fence was a shrubbery of box, laurel, and yew trees. On January 4, 1917, two of the yew trees overhung the fence to the extent of 3 feet. The plaintiff said that he did not know of the existence of the yew trees or that they were poisonous for cattle. The plaintiff's mare in foal was in the field, ate of the yew branches, and died.

The county court judge was of opinion that the case could not be distinguished from *Erskine* v. *Adeane* (1) and gave judgment for the defendant.

The plaintiff appealed.

(1) L. R. 8 Ch. 756.

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Vachell, K.C., and *A. F. Clements*, for the appellant. If the parties in this case were adjoining owners holding under independent titles the defendant would be liable on the principle of *Rylands* v. *Fletcher* (1); *Crowhurst* v. *Amersham Burial Board* (2); *Smith* v. *Giddy*. (3) The duty of a landlord towards his tenant is certainly not less than that of one owner to another. A landlord cannot derogate from his grant; he cannot let a farm and then endanger the stock. The dictum of Mellish L.J. in *Erskine* v. *Adeane* (4), "caveat lessee," was obiter and ought not to be extended. It applies to cases where the danger exists at the date of the lease, not to cases like this where it develops after the commencement of the lease.

Craig Henderson, for the respondent. The relevant cases fall into two classes—(1.) where the danger is a natural growth; (2.) where it is artificially produced. The foundation of the liability in *Rylands* v. *Fletcher* (1) is the importation of the dangerous object. In *Crowhurst* v. *Amersham Burial Board* (2) the defendants had planted the yew trees which caused the damage, and so they were held liable. In *Giles* v. *Walker* (5) the thistle seeds were a natural growth on the land of the defendant, and so he was held not liable. *Smith* v. *Giddy* (3) calls for reconsideration, inasmuch as *Giles* v. *Walker* (5) was not cited to the Court. If this were a case of adjoining owners the defendant, not having planted the yew trees, would not be liable. Still less is he for letting land with these yew trees overhanging, as they must have been according to the evidence. The dictum of Mellish L.J. in *Erskine* v. *Adeane* (6) is good law, and it applies to the present case. The plaintiff took the land as he found it with the shrubbery close to the boundary and the yew trees actually overhanging, or certain soon to overhang, the boundary.

Vachell in reply.

LORD COLERIDGE J. The agreement of tenancy in this case contains no provision directly applicable to the question in dispute. We have therefore to revert to the obligations implied from the relationship between the parties. The landlord let to the tenant a

(1) L. R. 3 H. L. 330.
(2) (1878) 4 Ex. D. 5.
(3) [1904] 2 K. B. 448.
(4) L. R. 8 Ch. 761.
(5) (1890) 24 Q. B. D. 656.
(6) L. R. 8 Ch. 756.

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field. At the time of the letting there was a yew tree growing on the ground retained by the landlord and not let. In my opinion the presumption is that the yew tree was artificially planted and was not indigenous. At the time of the demise the tree, although it overhung the demised property, was harmless. It could not be reached by cattle or horses, but during the tenancy it grew and came within reach of horses. It is found as a fact that the plaintiff's mare ate of the leaves and was poisoned. The plaintiff brings an action against his landlord in respect of the damage so caused, which the county court judge has assessed.

It seems to be established that of two adjoining owners, between whom there is no privity of contract, one cannot bring upon his land or, having done so, permit thereon to remain a poisonous tree so as to project over the land of the other. If damage is thereby caused that is in the nature of a tort: *Crowhurst* v. *Amersham Burial Board*. (1) In *Smith* v. *Giddy* (2) it was laid down in clear terms that an action lies against an adjoining landowner for allowing his trees to overhang the boundary to the damage of the plaintiff's crops, which is only expressing in a concrete form the principle which since *Rylands* v. *Fletcher* (3) is the law of the land. Again, if a landowner keeps a poisonous tree within his boundary he is not responsible if his neighbour's cattle trespass and are thereby poisoned. This may involve technicality in certain cases. For example, one close may be bounded by a yew hedge clipped annually so as not to exceed the limits of the boundary. If that hedge should project ever so slightly over the neighbouring land, the owner may be responsible: *Smith* v. *Giddy* (2); if the cattle eat of it by putting their heads over the boundary, the owner of the hedge is not liable: *Ponting* v. *Noakes*. (4)

That being the law as to adjoining owners between whom there is no privity, if the present case were one between such owners the defendant would be liable. The argument has turned upon a supposed distinction between the cases of owner and owner on the one hand and landlord and tenant on the other, and the question is whether, if a landlord permits a poisonous tree to overhang his tenant's land whereby damage is caused, the landlord is liable. It

(1) 4 Ex. D. 5.
(2) [1904] 2 K. B. 448.
(3) L. R. 3 H. L. 330.
(4) [1894] 2 Q. B. 281.

was strongly urged that there must be on the part of the landlord towards his tenant to whom he lets the land and from whom he derives benefit a duty at least equal to that which he would owe to an adjoining owner who is a stranger. That was met by the argument that the tenant took the demised premises as they were with the yew tree in situ, and so caveat emptor; or that it was in his power to reject the lease; or take some warranty from the landlord that the damage should not occur, and that in this case no such warranty was asked for or given. In support of this contention *Erskine* v. *Adeane* (1) was cited. The only doubt in my mind is raised by that case, which therefore needs some investigation in order to see what it actually laid down. The only point applicable to this case which was decided was that there is no implied warranty by a lessor who leases land for agricultural purposes that there are no poisonous plants on the demised premises. But, though the case was based on a warranty, the Court discussed the question whether the defendants were liable for negligence. The defendants were sued as executors and, the case having failed on the warranty, the Court proceeded to consider a question which was not really in issue, namely, whether a personal action of negligence against a deceased man would survive against his executors. James L.J. having held that there was no implied warranty went on to say that any claim against the executors for the negligence of their testator was statute-barred. James L.J. went no further than that; but Mellish L.J. said clearly (2): "The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is *caveat emptor*, so in the case of taking the lease of property the rule is *caveat lessee;* he must take the property as he finds it. I never heard that a landlord warranted that the sheep should not eat his yew trees. Yew trees, it appears, are not at all times poisonous; and although it is not uncommon for them to grow in plantations, or about a farm, it is very rare for any accident to happen on account of them. In my opinion the lessee must take his chance of such a damage, or ask for an express warranty if he thinks there is reason to fear that his cattle or sheep may be injured." This is obiter, but it is the dictum of a very great judge.

(1) L. R. 8 Ch. 756. (2) L. R. 8 Ch. 761.

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We are not actually bound by it; nevertheless, but for that dictum, I should have held that this action would lie, being unable to draw any distinction between the cases of owner and owner and landlord and tenant. In my view the distinction drawn on the authority of *Erskine* v. *Adeane* (1) is a thin one, and the dictum of Mellish L.J. should be taken literally to the extent to which it goes, but no further. It would apply if, when the tenant took the lease, the yew trees overhung the demised premises and were within reach so that animals could eat them. It only applies to the time of taking the lease. The circumstances of nature altered the facts between the taking of the lease and the occurrence of the accident; the tree which was harmless became harmful. I do not think Mellish L.J. meant to say that the tenant when he took the lease was bound to guard himself against dangers other than those existing at the date of the lease; he was not bound to assume that the landlord would omit to do what was proper for him to do, that he would neglect to cut the yew tree and would suffer it to become a danger. With all respect to the Lord Justice's dictum, I am not prepared to extend it. It would not preclude that learned judge, if he were here, from holding it applicable only to the state of things existing at the time of the lease. In my judgment the plaintiff is entitled to succeed, and this appeal should be allowed.

ROWLATT J. I regret that I cannot take the same view. If these parties had been independent freeholders and the tree had grown over the fence, without question this action would have been well brought. If the land had been sold by the defendant to the plaintiff and afterwards the tree had grown over the fence, it having been in situ before but not projecting, the action could have been maintained. Probably, if the defendant had sold to the plaintiff the land with the tree already overhanging the boundary, the plaintiff would have succeeded, because a vendor selling land and reserving no right sells usque ad caelum. But in the present case the defendant let the land to the plaintiff; that is to say, he did not convey it to him to do what he liked with from the soil to the sky, but gave him possession for a time with a reversion to himself. The timber was reserved and the tenant agreed not to cut it. If the tenant had

(1) L. R. 8 Ch. 756.

taken the land with a poisonous tree growing upon it, he could not complain. If the landlord, having let the field to the tenant, had afterwards planted a poisonous tree in his own land so near to the demised field that it grew over the boundary, he might have been liable. I am not clear how the case would stand if the landlord had on his own land a yew tree which at the time of the demise did not overhang the boundary but afterwards during the tenancy grew over the boundary. Mellish L.J. seems to have contemplated such a case when he spoke of " negligence in allowing the branches of the yew trees to grow over the hurdles " (1), and said that a claim would, if maintainable at all, be by personal action. But that case is much stronger than the present. In this case the land was taken with the tree already overhanging it, though no doubt it has grown since. For the damage incurred how does the plaintiff lay his action ? Not in negligence, unless there is an implied duty upon the landlord to cut down or cut back the tree ; and not in trespass, unless it was the intention of the parties that the tree should not be maintained. In the present case it was not contemplated either that the tenant should himself cut the tree when it overhung or expect the landlord to do so. The tenant took the place as he found it. He took it up to the shrubbery. Its growth was neither a trespass nor a nuisance. He took his chance as to what it consisted of. That was the view of Mellish L.J. in *Erskine* v. *Adeane* (2), and I should have thought the same myself. It may be undesirable that land should be let with yew trees growing over it, but I see nothing to make it unlawful. In my opinion this appeal fails.

Appeal dismissed.

Solicitors for appellant : *Helder, Roberts, Childs & Watson, for F. Treasure, Gloucester.*

Solicitors for respondent : *Peacock & Goddard, for Sewell & Rawlins, Cirencester.*

(1) L. R. 8 Ch. 760, 761. (2) L. R. 8 Ch. 756.

W. H. G.

1917
June 13, 14.

WILLIAM FRANCE, FENWICK & CO., LIMITED *v.* NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION.

[1916 W. 448.]

Insurance (Marine)—Proximate Cause of Loss—Insurance against Loss through Consequences of Hostilities—Damage to Ship by running on Wreck of Vessel sunk by Enemy Submarine.

The plaintiffs' steamship *Sherwood* was insured by a policy issued by the defendant association which was expressed to cover only the risks of capture, seizure, and detainment by the King's enemies, all consequences of hostilities, and all risks excluded from an ordinary policy by the f. c. and s. clause. The policy was also subject to the rules of the defendant association, which provided that the ship was to be deemed to be fully insured by an ordinary policy against all other risks. During the currency of the policy the *Sherwood* ran upon, and was seriously damaged by, the submerged wreck of another vessel which had been torpedoed and sunk in shallow water by an enemy submarine some hours previously. There had been no time to mark the spot where the wreck lay. In an action to recover under the policy :—

Held, that the damage to the *Sherwood* was not proximately caused by the perils insured against in the policy sued on, and therefore that the plaintiffs were not entitled to recover.

Action tried by Bailhache J. as a commercial cause.

The plaintiffs, the owners of the steamship *Sherwood*, were insured by a policy issued by the defendants which was expressed to cover only (*a*) the risks of capture, seizure, and detainment by the King's enemies and the consequences thereof, or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after declaration of war ; and (*b*) all risks not covered by (*a*), which were excluded from recovery under the ordinary policy upon hull and machinery by reason of the presence in such policies of the f. c. and s. clause of the Institute Clauses. The policy was also subject to the rules of the defendant association, which provided that the ship was to be deemed to be at all times fully insured by an ordinary policy against all other risks.

At 9 A.M. on August 1, 1915, the steamship *Fulgens* was torpedoed and sunk in shallow water by a German submarine off the English

coast. On the same day at 6.40 P.M., and before there had been time to mark the spot where the *Fulgens* lay, the *Sherwood*, without negligence, ran upon the wreck and sustained damage to the amount of 5500*l.*, and in respect of this damage the plaintiffs now sought to recover.

The defendants said that the damage was not approximately caused by the perils insured against in the policy sued upon.

Roche, K.C., and *R. A. Wright*, for the plaintiffs. The proximate cause of the damage to the *Sherwood* was the torpedoing and sinking of the *Fulgens* by the enemy submarine. If the facts had been that the submarine, aiming at vessel A, had caused that vessel to sheer and run into vessel B, it is clear that the damage occasioned to the latter vessel would have been within this policy as a consequence of hostilities; equally it is a consequence of hostilities where vessel A, instead of sheering and damaging vessel B, sinks and vessel B runs on to her and sustains damage where, as in this case, there was no time to mark the spot where the vessel was sunk. It is as if the *Sherwood* had struck a hostile mine. The danger caused by the torpedoing of the *Fulgens* had not ceased to exist when the *Sherwood* sustained damage: *Reischer* v. *Borwick* (1); *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*. (2) The wrecked *Fulgens* had not had time to pass into the category of ordinary marine perils. [They also cited *Ionides* v. *Universal Marine Insurance Co.* (3)]

Leslie Scott, K.C., and *C. R. Dunlop*, for the defendants. The hostile act of the enemy submarine in sinking the *Fulgens* was not the proximate cause of the damage to the *Sherwood*, and therefore the plaintiffs are not entitled to recover under this policy. The area of navigation was wide, and it was the merest chance that the *Sherwood* went over the spot where the wrecked *Fulgens* lay. Suppose that instead of a few hours some weeks or even years had elapsed between the sinking of the *Fulgens* and the damage caused to the *Sherwood*, it could not possibly be contended that the damage to the *Sherwood* was a consequence of hostilities. The wrecked *Fulgens* was an ordinary obstruction to navigation, and the damage to the

(1) [1894] 2 Q. B. 548. (2) [1917] 1 K. B. 873.
(3) (1863) 14 C. B. (N.S.) 259.

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Sherwood would not have occurred but for two fortuitous circumstances, namely, the fact that the *Fulgens* was in shallow water, and the absence of any swell which would have disclosed the existence of the wreck at the particular spot. The damage was not the necessary result of the sinking of the *Fulgens*, but was due to an ordinary marine peril. If the enemy submarine had sunk the *Fulgens* purposely in a narrow channel, and the *Sherwood* in navigating that channel had struck the wreck and sustained damage, the damage would in that case have been the consequence of hostilities; but that is very different from what actually happened. [They referred to Scrutton L.J.'s judgment in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*. (1)]

Roche, *K.C.*, in reply. If the time that elapsed between the sinking of the *Fulgens* and the running on to her by the *Sherwood* had been sufficiently long to enable the spot to be marked with a buoy, the collision would not have been the natural result of the sinking of the *Fulgens*; but the time that elapsed being in fact so short as to exclude the possibility of marking the spot, the collision was the natural result of the sinking of the *Fulgens*. Moreover, the area of navigation was not, as suggested by the defendants, wide. The *Sherwood* was following the Admiralty instructions in keeping within the three-mile limit; it was therefore not unlikely, but was indeed quite natural, that the *Sherwood* should run on to the unmarked wreck.

Cur. adv. vult.

June 14. BAILHACHE J. read the following judgment: On Sunday, August 1, 1915, the steamship *Fulgens*, on her voyage from Hartlepool to London, was sunk off Palling in Norfolk at about 9 A.M. in shallow water by a German submarine. On the same day at 6.40 P.M. the plaintiffs' steamship *Sherwood*, on her voyage from London to Methil in Scotland, before there had been time to buoy or otherwise mark the spot where the *Fulgens* lay, and without negligence, ran upon the *Fulgens*, made water fore and aft, and sustained particular average damage to the amount of 5500*l.*

For this sum the plaintiffs sue the defendants, the underwriters, upon a war risks time policy dated June 14, 1915. The policy is

(1) [1917] 1 K. B. 873.

expressed to cover risks, inter alia, (*a*) of all consequences of hostilities, and (*b*) all risks excluded from recovery under the ordinary policies upon hull and machinery by reason of the presence in such policies of the f. c. and s. clause of the Institute Clauses now in use.

The question I have to determine is whether the loss in this case is covered by this policy and is not covered by the ordinary marine policy containing the f. c. and s. clause. The authorities bearing upon the point have been so closely examined by the Court of Appeal in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1) that it would be mere pedantry on my part to discuss them again.

The question is the same whether one approaches it from the standpoint of whether this loss is excluded from an ordinary marine policy containing the usual f. c. and s. clause or from the standpoint of whether it is within this policy. The defendants' rules, however, which are incorporated into this policy, preclude the plaintiffs from recovering if the loss is covered by the ordinary form of marine policy with the f. c. and s. clause, and I propose to consider the matter from that point of view.

Now, the running of a ship upon a sunken wreck is an ordinary marine peril, and damage sustained in consequence of so doing is recoverable under a marine policy. I agree, however, with the plaintiffs that where a marine policy contains the usual f. c. and s. clause one must make further inquiry and ascertain whether that marine peril was brought into operation by an act of hostility. In making this further inquiry it must always be remembered that the act of hostility to be looked for must be the proximate cause. It is not sufficient that some act of hostility is one of the links in a chain of causes without which link the accident would not have happened. It must be the effective proximate link in the chain.

I do not think there is any difference of opinion as to the test to be applied, but there is always room for difference of opinion as to how the test works out in the circumstances of a particular case. In this case I think the act of hostility, the sinking of the *Fulgens*, was too remote. I can perhaps best explain my reason for coming to this decision by two illustrations. Let me suppose a torpedoed timber ship, deserted and derelict but not sunk, and a collision in

(1) [1917] 1 K. B. 873.

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the dark with such a ship. That would, in my opinion, be a marine peril and the loss would be recoverable under a marine policy containing the ordinary f. c. and s. clause. Again, let me suppose a case where there was a narrow and shallow entrance to a port and the enemy deliberately sank a ship in the entrance for the purpose of damaging any vessel trying to make the port and succeeded. Such a case would, in my opinion, be covered by this policy and not by a marine policy with the f. c. and s. clause. This case seems to me to fall within my first illustration and not within my second. The truth obviously is that the act of hostility on which the German submarine was bent was the sinking of the *Fulgens*. Having sunk the *Fulgens* the submarine had attained her end. The object of the submarine was to sink the *Fulgens*, and not by sinking the *Fulgens* to destroy some other ship.

All that can be said in the plaintiffs' favour in this case is that but for hostilities this loss would not have been sustained ; but the rule in insurance law, that one must seek the proximate cause, is so rigid that that statement does not carry the plaintiffs far enough. The casualty was due to the fact that by a singular chance the *Sherwood* happened to pass over the very spot where the *Fulgens* had been sunk. There was no particular reason why she should do so. I think vessels navigating the sea must, in the matter of wrecks, take the sea as they find it, and if they run upon a wreck the reason why the wreck happened to be there is immaterial unless it was actually placed there as an act of hostility for the purpose of damaging passing vessels.

My judgment must be for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs : *Botterell & Roche.*

Solicitors for defendants : *Lightbound, Owen & Co., for Ingledew & Fenwick, Newcastle-upon-Tyne.*

J. S. H.

In re PAWSON.

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Feb. 27; *May* 3, 4, 14.

Bankruptcy—Secured Creditor—Proof for Part only of Debt secured—Vote in respect of Debt proved—Surrender of Security to Extent of whole Debt secured—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *First Schedule, clause* 10.

By clause 10 of the First Schedule to the Bankruptcy Act, 1914, "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security . . . . and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

At the first meeting of creditors a creditor of the bankrupt proved for a debt of 1113*l.* without stating the particulars of or valuing a deed of indemnity and mortgage which covered not only the debt of 1113*l.*, but all moneys which might become owing by the debtor to him, and voted in respect of the proof for the 1113*l.* At the time the creditor voted the debtor was in fact indebted to him in further sums, and the creditor was entitled to prove also for his contingent liability as a surety for the bankrupt on bills for a considerable amount on which he had placed his name. All these matters were covered by the mortgage. The judge was not satisfied that the omission to value the mortgage had arisen from inadvertence:—

Held, that the creditor, by voting in respect of the debt he had proved, must be deemed under clause 10 to have surrendered the mortgage, not only to the extent of the 1113*l.*, but to the extent of the whole liability of the bankrupt to him, and that the mortgage must be cancelled so far as it consisted of a security on the property of the bankrupt for debts to become due from him to the creditor.

The words "whole debt" in clause 10 mean the debt for which the creditor has proved.

MOTION on behalf of the trustee of the estate of the bankrupt, Pawson, for (inter alia) a declaration that the respondent, Captain Bewicke, by voting at a meeting of creditors held on November 6, 1907, in respect of the whole debt comprised in a proof of debt for 1113*l.* sworn by him on November 5, 1907, surrendered for the benefit of the creditors a security for the debt, consisting of an indenture of indemnity and mortgage executed by the bankrupt on

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December 28, 1906, of the property of the bankrupt specified in the mortgage, and that the respondent was not entitled to rank as a secured creditor on the property comprised in the mortgage in priority to the trustee, and an order that the deed of indemnity and mortgage might be cancelled so far as it consisted of a security on the property of the bankrupt for the debts to become due from him to the respondent. There was also a cross-motion on behalf of the creditor Captain Bewicke for (inter alia) (1.) an order that he might be at liberty at his own expense to amend his proof by inserting therein the particulars and value of the security, or in the alternative that he might be at liberty to withdraw the proof and rely on the security for the payment of the debt due to him by the debtor; (2.) alternatively for a declaration that the mortgage was not affected by the omission to value except in so far as it related to the debt in respect of which the proof was lodged, namely, to the extent of 1113*l.*

On December 28, 1906, the debtor, Captain Pawson, executed an indenture of indemnity and mortgage in favour of the creditor, Captain Bewicke, by which he conveyed to Bewicke the property specified in the mortgage as security for all moneys which might be paid by Bewicke on certain bills upon which he had at the request of the debtor, but without consideration, indorsed his name, or which might be lent by Bewicke to Pawson, or otherwise become owing from him to Bewicke together with interest on all such moneys at the rate thereinafter mentioned.

On September 11, 1907, a receiving order was made against the debtor. At the first meeting of creditors, held on November 6, 1907, the respondent tendered a proof for 1113*l.* which was admitted for voting purposes, and the respondent voted in respect of the proof. The proof, which was sworn on November 5, 1907, was (so far as material) as follows: "I, Calverley Bewicke, ... make oath and say that . . . . Pawson was at the date of the receiving order, viz., September 11, 1907, and is still justly and truly indebted to me in the sum of one thousand one hundred and thirteen pounds for moneys paid by me as his surety and lent by me to him as shown by the account indorsed hereon for which sum or any part thereof . . . . I have not nor hath any person by my order to my knowledge or belief for my use had or received any manner of satisfaction

or security whatever." The following account was indorsed upon the proof:—

Date.	Consideration.	Amount.	Remarks.
		£ s. d.	
12th April, 1907	To money lent as per I.O.U.	100 0 0	
8th June, 1907	To paid sheriff for Wilton & Co. ..	509 0 0	
10th Aug., 1907	To paid Wilton & Co.	504 0 0	
		£1113 0 0	

On November 6, 1907, the date on which Captain Bewicke voted, the debtor was not only indebted to him in respect of the 100*l.* lent by him on the I.O.U. and the two sums of 509*l.* and 504*l.* paid by him as set out in the proof, but was also indebted to Captain Bewicke in respect of a sum of 42*l.* which he had paid for costs of the preparation of the deed, and 149*l.* for a year's premium on a policy of assurance, and Captain Bewicke was also entitled to prove for his contingent liability as a surety for the bankrupt on bills for a considerable amount on which he had placed his name. All these matters were duly covered by the mortgage.

By the Bankruptcy Act, 1914, First Schedule, clause 10: "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

E. W. Hansell, for the trustee. The words "whole debt" in clause 10 of the First Schedule to the Bankruptcy Act, 1914, mean the amount for which the debtor has proved. By electing to vote in respect of the sum for which he had proved Captain Bewicke lost his security for the whole of the debt which was in fact due to

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him. He could have proved for the whole of the debtor's liability to him, but he did not do so. He elected to prove for a part of it, namely, the 1113*l.* Having abandoned his security, it would be right to allow him to amend his proof by proving for the whole debt due to him. There was one entire debt and one entire security. He cannot split up the debt. [*In re Paine* (1) and *Wolmershausen* v. *Gullick* (2) were referred to.]

Clauson, K.C., and *Sanger*, for secured creditors.

Clayton, K.C., and *Merlin*, for the creditor, Captain Bewicke. The set of facts which has arisen in the present case was obviously not contemplated when clause 10 of the First Schedule to the Bankruptcy Act, 1914, was drafted. Captain Bewicke has not, within the meaning of the clause, voted in respect of his "whole debt." Those words mean the whole sum due to the creditor at the time he votes. But, even if the words "whole debt" mean the debt for which he has proved, the word "security" in the clause must be read as meaning "the security to the extent of such debt," i.e., the debt for which he has proved. Captain Bewicke is therefore entitled to rely on his security to the extent to which the debtor subsequently became liable to him.

May 14. The following judgment was read by

HORRIDGE J., who, after holding that the security was intentionally concealed by the creditor, Captain Bewicke, and that he (the learned judge) was not satisfied upon the facts that the omission to mention or value it in the proof arose from inadvertence, continued: I therefore cannot see my way to give Captain Bewicke any relief under clause 10 of the First Schedule to the Bankruptcy Act, 1914.

A difficult question remains. At the time the proof was tendered the bankrupt was further indebted to Captain Bewicke in the sums of 42*l.* and 149*l.*, and Captain Bewicke was entitled to prove also for his contingent liability as a surety who had put his name on the bankrupt's bills: *In re Paine.* (1) All these matters were duly covered by the security, and the proof should have been made for the full amount of the actual and contingent liability, setting out

(1) [1897] 1 Q. B. 122. (2) [1893] 2 Ch. 514.

the particulars of the mortgage of December 28, 1906, which secured all these matters.

Does the omission to value such security cause the security to be entirely surrendered to the trustee, or is it still a security for the matters which were not included in the proof? The words of clause 10 are: "If he votes in respect of his whole debt he shall be deemed to have surrendered his security." I think the words "whole debt" are used in contradistinction to the previous words in the section: "balance (if any) due to him after deducting the value of his security."

I think he votes in respect of his whole debt within the meaning of the section if he votes in respect of the debt which he has proved, and that therefore he must be deemed, having not chosen to put in a claim for his whole debt, to nevertheless have surrendered the security within the words of the section, and not merely a portion of the security. This seems to be the only workable rule, as otherwise, under these circumstances, there would be a partial surrendering of the security to which the trustee would be entitled, and the balance of the same security would be held by Captain Bewicke as security for a portion of his claim which he omitted to insert in his proof. I think he must be taken by not valuing the security to have surrendered it in its entirety.

If my decision as to the whole of the security having been surrendered is correct, I think the trustee ought now to admit a further or amended proof in respect of the other liabilities of the bankrupt to Captain Bewicke which were not included in his first proof; but of course Captain Bewicke would not be entitled to in any way claim the value of the security if he adopts the course of sending in a further or amended proof.

There must be a declaration that the respondent, by voting at a meeting of creditors held on November 6, 1907, in respect of the whole debt comprised in a proof of debt for 1113*l.* sworn by him on November 5, 1907, surrendered for the benefit of the creditors a security mentioned in the notice of motion for such debt, and that the respondent is not entitled to rank as a secured creditor of the property comprised in the said mortgage in priority to the trustee; and there must also be an order that the said deed of indemnity and mortgage be cancelled so far as the same consists of a security on the

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property of the bankrupt for the debts to become due from him to the respondent.

Trustee's motion allowed. Cross-motion dismissed.

Solicitors for trustee : *Mawby, Mawby & Morris.*

Solicitors for creditor Bewicke : *Kenneth Brown, Baker, Baker & Co.*

Solicitors for secured creditors : *Young, Jackson, Beard & King.*

J. E. A.

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June 11, 12 ; *July* 2.

JACOBS *v.* DAVIS.

[1917 J. 1382.]

Contract—Marriage—Engagement Ring—Right to Return of Ring.

When an engagement ring is given by a man to a woman, there is an implied condition that the ring shall be returned if the engagement is broken off.

ACTION tried before Shearman J. without a jury.

This action was brought to recover a diamond engagement ring which had been given by the plaintiff to the defendant on their engagement. Subsequently the engagement was broken off. The plaintiff alleged an express condition that the ring should be returned in case the intended marriage should not take place.

Farleigh, for the plaintiff.

Wild, K.C., and *Woodfin,* for the defendant.

SHEARMAN J. The plaintiff alleges that on the day of the engagement he gave the defendant the ring on the express condition that it should be returned if the marriage did not take place. If I were dealing with the psychology of a class of people with whom I am more familiar than I am with Jews, I would not hesitate to disbelieve the story. As it is, I am not satisfied that the plaintiff has given a true account of the express terms upon which the ring was

given. That reduces this case to one in which the defendant in the ordinary way wore the ring for several months as an engagement ring until the contract was broken off. These people were living under the Mosaic law, but the law which must be applied is English law. It has to be decided, therefore, what the law of England is with regard to an engagement ring. Usually good sense secures the return of the engagement ring with other presents. The only English authority is the case of *Robinson* v. *Cumming* (1), where Lord Hardwicke said: "I think, in cases of this nature, these rules may be laid down, That if a person has made his addresses to a lady for some time, upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him: but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favour, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run risks, and loses by the attempt, he must take it for his pains." That deals with presents generally, and not specially with the engagement ring. The history of the engagement ring is interesting. We read in the Book of Genesis that Abraham presented earrings when Rebecca was betrothed to Isaac; and, no doubt, the story represents the ring in those days as a sign or symbol of an agreement to carry out a bargain and sale of the woman. When one comes to the time of civilized law, the woman ceases to be a chattel, and one finds in Justinian the ring used as an "arrhabo," or a pledge for the contract of marriage or sponsalia. This found its way even into early English law. Times, however, are changed now; but, though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied

(1) (1742) 2 Atk. 409.

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condition that it should be returned if the defendant broke off the engagement. She did break the contract, and therefore must return the ring.

Judgment for plaintiff.

Solicitor for plaintiff: *R. Raphael.*

Solicitor for defendant: *W. B. Glasier.*

J. H. W.

K. B. D.

1916
Dec. 11.

1917
C. A.
April 30;
May 1;
June 11.

[IN THE COURT OF APPEAL.]

HOGARTH SHIPPING COMPANY, LIMITED *v.* BLYTH, GREENE, JOURDAIN & CO., LIMITED.

Ship—Charterparty—Bill of Lading to be "conclusive proof of cargo shipped"—Condition in Bill of Lading that "weight, &c., unknown" —Estoppel.

By charterparty, it was provided that a steamer should load a cargo of sugar in bags and proceed to one of several named ports and there deliver it. A clause of the charterparty provided: "The captain to sign Eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped, and their conditions to form part of this charterparty." The captain signed a bill of lading for a specified number of bags of sugar, one of the exceptions and conditions of the bill of lading being "weight, measure, quality, contents and value unknown"; the bill of lading also contained the clause "freight and all other conditions and exceptions as per charterparty." At the port of discharge there was a shortage in the number of bags of sugar, but evidence was given that all the bags placed on board had been delivered:—

Held, by Lush J., that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles and not as to their contents.

Held, by the Court of Appeal, that the conclusive evidence clause of the charterparty was not incorporated in the bill of lading, and that the shipowners were not estopped from showing that all the bags of sugar shipped on board had been in fact delivered.

AWARD stated in the form of a special case.

By a charterparty, dated October 27, 1914, made between the Hogarth Shipping Company, Limited (hereinafter called the respondents), and Blyth, Greene, Jourdain & Co. (hereinafter called the claimants), it was agreed that the respondents' steamship *Baron*

Napier should proceed to Port Louis, Mauritius, and there load as customary from the charterers a full and complete cargo of sugar in bags, not exceeding 7200 tons and not less than 6800 tons, and should therewith proceed under steam to London, Liverpool, Avonmouth, Cardiff, Hull, Newcastle, Leith, or Clyde (one port) and deliver the same. Clause 12 of the charterparty provided as follows: "The captain to sign Eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped, and their conditions to form part of this charter-party, at any rate of freight required by the charterers without prejudice to this charter-party, but at not less than the average charter rate, unless the difference is paid in cash before signing, at current rate of exchange for ninety days' sight bank bills." By clause 19 any dispute arising under the charter was to be settled by arbitration.

The *Baron Napier* shipped a cargo of sugar at Port Louis, and the captain signed a bill of lading in which it was expressed that there had been shipped "eighty seven thousand nine hundred and sixty six bags and seven thousand four hundred and fifty three pockets of sugar weighing gross seven millions three hundred and ninety thousand one hundred and twenty five kilos and five cases of sugar samples being marked and numbered as per margin; and to be delivered subject to the exceptions and conditions hereinafter mentioned in the like good order and condition from the ship's tackles . . . . The following are the exceptions and conditions above referred to:—Weight, measure, quality, contents and value unknown. . . . . The ship is not liable for . . . . numbers, address or description of goods." At the end of the bills of lading came the following clause: "Freight and all other conditions and exceptions as per charter-party."

Disputes having arisen between the parties, they were referred to the arbitration of Mr. R. A. Wright. The points of claim delivered in the arbitration (1) were as follows: "1. By a charterparty dated October 27, 1914, and made between the respondents and Blyth, Greene, Jourdain & Co., Limited, acting on behalf of the Royal

(1) The arbitration was expressed to be between "The Royal Commission on the Sugar Supply, acting on behalf of His Majesty the King, claimants, and the Hogarth Steam Shipping Company, Limited, respondents."

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Commission on the Sugar Supply, acting on behalf of His Majesty the King as aforesaid, it was agreed, inter alia :—(*a*) That the *Baron Napier* should proceed with all possible speed to Port Louis, Mauritius, and there load . . . . a full and complete cargo of sugar in bags not exceeding 7200 tons and not less than 6800 tons . . . . and being so loaded shall therewith proceed as ordered . . . . to London, Liverpool, Avonmouth, Cardiff, Hull, Newcastle, Leith, or Clyde (one port) at a freight of 1*l.* 3*s.* 9*d.* per ton ; (*b*) the captain to sign Eastern trade b/ladings, which are to be deemed conclusive proof of cargo shipped. 2. The captain of the *Baron Napier* duly signed a bill of lading duly tendered to him by Elias Mallac et Cie. for 87,966 bags of sugar and 7453 pockets of sugar weighing 7144 tons 8 cwt. 3 qrs. 17 lbs. 3. These bills of lading were duly indorsed by Messrs. Mallac et Cie., and the said Royal Commission on the Sugar Supply are (acting as aforesaid) bona fide holders thereof in due course. 4. The respondents have delivered only 87,802 bags and 7447 pockets and four empty bags, whereby the claimants have suffered damage to the extent of 277*l.* 19*s.* 3*d.* 5. The claimants admit that there is due from them to the respondents a sum of 129*l.* 6*s.* 2*d.* in respect of balance of freight due to the respondents, but say that they are entitled to retain and set off this amount against their claim of 277*l.* 19*s.* 3*d.* as set forth in paragraph 4 hereof. The claimants claim 277*l.* 19*s.* 3*d.* less 129*l.* 6*s.* 2*d.* = 158*l.* 13*s.* 1*d.* (*sic*)."

The points of defence were as follows : "1. The charterparty dated October 27, 1914, is admitted and referred to for its terms. 2. The respondents will refer to the bill of lading for its terms, which are not correctly set out in the points of claim. The bill of lading contains the qualification "weight, measure, quality, contents and value unknown ; ship not liable for reasonable wear and tear of packages, leakage, breakage, sweat." The bill of lading was also subject to the usual exceptions, on which the respondents will, if necessary, rely. 3. Paragraph 3 of the points of claim is admitted. 4. The respondents deny that they only delivered 87,802 bags and 7447 pockets and four empty bags, or that they short delivered the alleged or any quantity of sugar, or that the value was as alleged. 5. The respondents in fact delivered all the sugar shipped and all the bags shipped. 6. The respondents deny that they are indebted

to the claimants in the sum of 277*l.* 19*s.* 3*d.* or in the sum of 158*l.* 13*s.* 1*d.* as alleged, or at all. 7. The respondents claim the sum of 129*l.* 6*s.* 2*d.* balance of freight. 8. While denying all liability, the respondents are willing to give credit for 4*l.* 2*s.* 5*d.*, being 160 bags at 6*d.* each and six pockets at $4\frac{3}{4}$*d.* each, and say that that sum is sufficient to satisfy the claimants' claim (if any)."

The arbitrator made the following award in the form of a special case: Whereas by a charterparty dated October 27, 1914, made between the Hogarth Shipping Company, Limited (hereinafter called the shipowners), as owners of the steamship *Baron Napier* and Blyth, Greene, Jourdain & Co., Limited, as charterers, acting in fact as agents for the Royal Sugar Commission (hereinafter called the receivers), it was agreed that the *Baron Napier* should load at Port Louis, Mauritius, a full and complete cargo of sugar in bags not exceeding 7200 tons and not less than 6800 tons and deliver the same at one of certain ports specified in Great Britain at freight of 1*l.* 3*s.* 9*d.* per ton. The charterparty provided that charterers' responsibility was to cease on cargo being loaded, and that the captain was to sign Eastern trade bills of lading, which were to be deemed conclusive proof of cargo shipped, and their conditions to form part of the charterparty at any rate of freight required by the charterers without prejudice to the charterparty. And whereas the *Baron Napier* loaded a cargo of sugar in bags at Port Louis, Mauritius, and the captain signed a bill of lading dated November 26, 1914, acknowledging receipt of 87,966 bags of sugar and 7453 pockets of sugar (two pockets being the equivalent of a bag) weighing net 7144 tons 8 cwt. 3 qrs. 17 lbs. to be delivered to order subject to the exceptions and conditions mentioned. And whereas among such conditions was the following "Weight, measure, quality, contents and value unknown." And whereas there was further in writing on the bill of lading the provision "Freight and all other conditions and exceptions as per charter-party." And whereas the vessel discharged her cargo at Manchester to the receivers. . . . . And whereas I was requested to state this my award in the form of a special case. Now I make my award in the form of a special case in the manner following:

1. The charterparty and bill of lading are to form part of this award and special case.

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2. The points of claim and the points of defence respectively delivered by the parties are to form part of this award and special case.

3. The net weight of sugar which the shipowners claim to have delivered, and on which their claim to balance of freight, namely, 129*l.* 6*s.* 2*d.*, is based, is 7098 tons 7 cwt. 25 lbs. : this net weight has been arrived at by taking the tare on the gross weight declared by the Manchester Ship Canal Company, who weighed on behalf of the receivers, such gross weight being 7231 tons 13 cwt. 20 lbs. I find that such net weight is correct and shows a short out-turn as compared with the bill of lading weight of approximately 46 tons.

4. I find that all the sugar actually shipped was delivered at Manchester and that there was no loss of sugar on the voyage or during discharge. No claim was made against the shipowners based on the above difference in weight. There was evidence that considerable differences between bill of lading and out-turn weights were common in sugar cargoes.

5. I find that in respect of numbers of bags there was a considerable shortage in the numbers delivered as compared with the bill of lading numbers. The final numbers as counted on a recheck by the Manchester Ship Canal Company were 87,802 bags and mats and 7447 pockets and four empty bags, being a short delivery as compared with the bill of lading numbers of 160 bags and six pockets. There was no evidence called on behalf of the shipowners to account for such a loss of empty or damaged bags during discharge or to enable me to say that any number were so lost. I find that the bill of lading numbers of bags were overstated. I find that the ship delivered all the bags which it received.

6. The claim put forward for the receivers was based solely on the short delivery of bags as compared with the bill of lading numbers, and the amount of the claim, namely, 277*l.* 19*s.* 3*d.*, was arrived at by a calculation of the average or estimated contents of 160 bags and six pockets. The claim depended on a contention that the bill of lading, though not conclusive as to weight, was conclusive as to numbers of bags therein stated as having been shipped.

7. Subject to the opinion of the Court, I decide that the bill of lading, by reason that the ship's obligation to make delivery there-

under is expressly subject to the condition that the weight is unknown, cannot be construed as a bill of lading conclusive as to the cargo shipped, and I decide that it cannot be construed as conclusive as to numbers of bags stated, while not conclusive as to weight of cargo.

8. No claim was put forward before me by the receivers that the bill of lading in the form in which it was signed constituted a breach of the shipowners' obligations under the charterparty.

9. Subject to the opinion of the Court, I find and award that the receivers are not entitled to recover any sum from the shipowners on the claim submitted to me, and I find and award that the shipowners are entitled to be paid the sum of 129*l.* 6*s.* 2*d.* for balance of freight together with their costs of this arbitration to be taxed. I also award that the receivers shall bear and pay the costs of this award.

10. The question for the Court is whether I am right in deciding as I have done in regard to the construction of the bill of lading in paragraph 7 hereof.

11. If the Court is of opinion that I am right in so deciding, this award will stand.

12. If the Court is of opinion that I am wrong in so deciding and that the receivers are entitled to claim that the bill of lading is conclusive as to numbers of bags and that in consequence the receivers are entitled to claim for short delivery on the basis of the average and estimated weight of 160 bags and six pockets, then I award that they are to be paid by the shipowners 277*l.* 19*s.* 3*d.* less a deduction of 129*l.* 6*s.* 2*d.* balance of freight, or 158*l.* 13*s.* 1*d.* (*sic*), together with their costs of this arbitration to be taxed, and I also award that the shipowners bear and pay the costs of this my award.

13. If the Court is of opinion that I am wrong in so deciding and that the receivers are entitled to claim that the bill of lading is conclusive as to numbers of bags but not otherwise, and that the receivers are therefore only entitled to recover the value of 160 bags and six pockets in the sense of skins or receptacles, then I award that they are to be credited by the shipowners against the balance of freight with 4*l.* 2*s.* 5*d.* and are to pay such balance, namely, 125*l.* 3*s.* 9*d.* to the shipowners together with the shipowners' costs

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to be taxed of this arbitration and are also to bear and pay the costs of this my award.

Branson, for the claimants.
Le Quesne, for the respondents.

1916. Dec. 11. LUSH J. This case raises a very interesting point, which is this: By the charterparty the shipowners agreed with the merchants that the ship should proceed to the named port in Mauritius and should there load a full and complete cargo of sugar in bags. Then there is a maximum and minimum with regard to the weight of sugar which the bags were to contain. Clause 12, upon which the argument has turned, says: "The captain to sign Eastern trade bills of lading which are to be deemed conclusive proof of cargo shipped and their conditions to form part of this charterparty." There is the usual arbitration clause. The bill of lading is in these terms: "Shipped in good order and condition," and so on, "eighty seven thousand nine hundred and sixty six bags of sugar"—there were some pockets over, about which I will not trouble—"weighing gross seven millions three hundred and ninety thousand one hundred and twenty five kilos"—I need not read more of that part of the clause, but it says "to be delivered subject to the exceptions and conditions hereinafter mentioned" and "the following are the exceptions and conditions above referred to: weight, measure, quality, contents, and value unknown." Those exceptions and conditions therefore must be treated as read into the charterparty, because clause 12 says that they are to be deemed to form part of the charterparty or that they are to form part of the charterparty. Turning back to clause 12, one has to see of what the bills of lading as signed by the captain are conclusive proof. If there had been no exceptions or conditions read into the clause, then one conclusion would have followed, but, if the exceptions and conditions are to be read into the clause, then a different conclusion follows. Reading the exceptions and conditions into clause 12, it seems to me that clause 12 can only now have this operation—that the bills of lading are not to be conclusive proof at all as to the contents of the bags which the ship is to carry, nor are the bills of lading to be conclusive proof as to the quality of what is in the bags, or as

to the weight, or as to the measure, or as to the value. Clause 12 being, therefore, qualified and cut down by the introduction of the exceptions and conditions, of what is it that the bills of lading as signed by the captain are to be conclusive proof? In other words, of what is the ship to be estopped from giving evidence? What happened was that, whereas the bills of lading as signed by the captain stated that the number of bags of sugar which I have mentioned was on board, it turned out, when the cargo was discharged and the number of bags delivered to the merchant was computed and ascertained, that in point of fact the merchant was given all the bags that had been put on board, but 166 bags were missing when one takes into consideration the number of bags which in the bills of lading were said to have been shipped. The merchant says that the shipowner is estopped from disputing that the 166 bags short delivered were 166 bags of sugar. The shipowner, on the other hand, says: "Not at all: in the first place, I am at liberty to prove that you have received all the bags that were put on board, which is a complete answer to your claim for short delivery, because on the true construction of the exceptions and conditions clause in the bill of lading even the number of bags was a matter as to which I gave no guarantee, and I am at liberty, therefore, to prove that you have had all the bags that I ever took on board; and, secondly, if that is wrong, although I am estopped from disputing that you are entitled to 166 more bags than you have got, I am not estopped as to what would have been the contents of the bags." In other words, he says: "The captain has never guaranteed that you have received the total quantity of bags of sugar. He has only guaranteed that the ship took on board the guaranteed number of bags." I think that is stating the two contentions fairly accurately, and the question is, who is right upon those two contentions?

The dispute was referred to a learned arbitrator, who decided that it was competent to the ship to show that the merchant had received all the bags on board, and in any case, if the ship is responsible for the value of the missing bags, the ship is not responsible on the footing that the missing bags must be treated as bags of sugar, and therefore at the outside the utmost allowance to be made is a sum of between 4*l.* and 5*l.*

My view has varied during the argument; at first I was inclined

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Lush J.

to look upon the case for the appellants as a very strong one, but I am now satisfied that the view taken by the arbitrator was correct.

Estoppel is a mere rule of evidence; without this clause the shipowners would of course have been at liberty to prove that the ship had delivered to the merchant all that was ever put on board. If that was open to them here, that proof has been given; but I think it must be taken in favour of Mr. Branson's contention that with regard to the actual number of bags put on board there was a statement made by the captain as agent for the shipowners, which statement does conclude the shipowner. I do not see in the exceptions and conditions clause anything to make me hold that the shipowners were at liberty to show that the merchants have got all that was put on board, and there is an end of the matter; but, when one comes to consider what the measure of responsibility of the shipowners is, then I think that one is confronted with the difficulty that was so clearly pointed out by counsel for the respondents. The shipowners took good care when this contract was made to make it perfectly clear that they could not be responsible for any short delivery, or rather for damages through short delivery upon the basis that the bags not delivered contained any specific class of goods. The contents of the bags was a matter which the captain did not, and indeed could not, ascertain, and the shipowners protected themselves therefore by this clause 12 from being under any liability if there was a short delivery of bags where the damage would be assessed upon the footing that the missing bags were bags of sugar. I quite appreciate what counsel for the appellants pointed out, that if a certain number of bags had been lost, and one had to ascertain what was in the bags that were lost, as a matter of evidence one would almost necessarily infer that the lost bags were bags containing similar goods to those which were not lost, but I do not think that in this case that sort of question arises. One must first ascertain what the estoppel is before one considers what evidence can be given of the contents of bags which the merchants have never had, and, if one is satisfied that there is no estoppel with regard to the contents of any bags, it seems to me logically and necessarily to follow that the contention here on the part of the shipowners is the correct one, because, if the contention on the part of the merchants is correct, the shipowners are made

responsible upon the basis that they have bound themselves by the representation that they had 166 bags of sugar on board, which in fact the merchants have never had.

Although the case presents a somewhat puzzling question, I have come to the conclusion that the view taken by the learned arbitrator is right and that there is no estoppel with regard to the goods that have been short delivered, and consequently the shipowners are right in saying that, except as regards the value of those 166 bags, they are not bound by any representation, and they were at liberty to show that the merchants got all the sugar ever put on board. Therefore I think the award is correct, and the view taken by the learned arbitrator is the right one.

Judgment accordingly.

The claimants appealed. The respondents did not enter a cross-appeal as to the 4*l*. 2*s*. 5*d*.

Branson, for the claimants. The difficulty of the case arises from the fact that, notwithstanding the conclusive evidence clause in the charterparty, which is incorporated into the bill of lading, the arbitrator has gone behind it to find the number of bags actually shipped. The authorities show that he was wrong in so doing: *Crossfield & Co.* v. *Kyle Shipping Co.* (1); *Spaight* v. *Farnworth* (2); *Mediterranean and New York Steamship Co.* v. *Mackay.* (3) It is a reasonable inference that the 166 bags contained sugar of the same quality as the rest of the 87,000 bags. It can be seen from the outside that a bag contains sugar.

Le Quesne, for the respondents. The bill of lading does not sweep in the provision as to conclusive proof from the charterparty, which is inconsistent with the provision "weight, &c., unknown" in the bill of lading itself. If the bill of lading contains no definite statement, the charterparty cannot be relied upon to make it conclusive. [He cited *The Northumbria* (4), *Gardner & Sons* v. *Trechmann* (5), *Manchester Trust* v. *Furness* (6), and *Lohden & Co.* v. *Calder & Co.* (7)]

(1) [1916] 2 K. B. 885, 894.
(2) (1880) 5 Q. B. D. 115, 119.
(3) [1903] 1 K. B. 297.
(4) [1906] P. 292.
(5) (1884) 15 Q. B. D. 154.
(6) [1895] 2 Q. B. 539.
(7) (1898) 14 Times L. R. 311.

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Branson, in reply, cited *East Yorkshire Steamship Co.* v. *Hancock*. (1)

Cur. adv. vult.

June 11. SWINFEN EADY L.J., read the following judgment:— This is an appeal from a judgment of Lush J. on a special case stated by an arbitrator.

A claim was made by receivers of cargo for short delivery of a number of bags of sugar. The claim is based upon a provision in a charterparty, alleged to be incorporated in the bill of lading, that the bills of lading are to be deemed conclusive proof of cargo shipped.

The arbitrator found that the bill of lading numbers of bags were overstated, and that the ship delivered all the bags which it received. Also that the bill of lading was not conclusive as to cargo shipped, either as to numbers of bags or weight of their contents, and he found that the receivers were not entitled to recover any sum from the shipowners. If, however, contrary to his opinion, the Court should consider that the bill of lading is conclusive as to numbers of bags of sugar shipped, then the arbitrator awarded that there were 160 bags and six pockets short delivered, and that their value on the basis of average and estimated weight was 277*l.* 19*s.* 3*d.*, from which 129*l.* 6*s.* 2*d.* balance of freight would have to be deducted; if, however, the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles, then the receivers were entitled to 4*l.* 2*s.* 5*d.* for short delivery.

Lush J., before whom the point argued in this Court was not taken, held that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles and determined that the receivers were entitled only to 4*l.* 2*s.* 5*d.*

The receivers appeal from this decision. There is not any cross-appeal by the shipowners in respect of the 4*l.* 2*s.* 5*d.* Indeed, by their defence they offered to give credit for that amount while denying liability. It appears from the points of claim that the parties claiming are the Royal Commission on the Sugar Supply acting on behalf of His Majesty the King; they claim as indorsees of the bill of lading, which has been duly indorsed to them by Elias Mallac et Cie., the shippers of the cargo (acting for the Mauritius

(1) (1900) 5 Com. Cas. 266, 268.

Commercial Bank), and in paragraph 3 of the points of claim they allege that they are the bona fide holders in due course of the bills of lading.

Paragraph 3 of the points of claim is expressly admitted by paragraph 3 of the points of defence. The arbitrator in paragraph 8 of his award stated that no claim was put forward before him by the receivers that the bill of lading in the form in which it was signed constituted a breach by the shipowners of their obligations under the charterparty.

The circumstances which give rise to the difficulty are the respective provisions of the charterparty and the bill of lading, which are alleged to be conflicting. The charterparty provides that the ship shall load a full and complete cargo of sugar in bags not exceeding 7200 tons and not less than 6800. Clause 12 is as follows: "The captain to sign Eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped, and their conditions to form part of this charter-party, at any rate of freight required by the charterers, without prejudice to this charter-party, but at not less than the average charter rate, unless the difference is paid in cash before signing, at current rate of exchange for ninety days' sight bank bills." The charterparty is dated October 27, 1914, and is expressed to be made between the Hogarth Shipping Company, Limited, as owners, and Blyth, Greene, Jourdain & Co., Limited, of London, merchants. It is signed by agents for the owners, and by H. D. Blyth & Co. as agents for the merchants. The proceedings in the arbitration were expressed to be between the Sugar Commission acting on behalf of His Majesty and the Hogarth Steam Shipping Company, Limited, although the order made by Lush J. was intituled as if the arbitration were between the shipping company and Blyth, Greene, Jourdain & Co., Limited. This seems to have been a slip. The claim, which went to arbitration and was the subject of the special case, was a claim by the Sugar Commission as indorsees of the bill of lading, and it is on that footing that in my opinion the matter has to be decided. The bill of lading states that there has been shipped in good order and condition 87,966 bags and 7453 pockets of sugar, weighing gross 7,390,125 kilos and five cases sugar samples, marked and numbered as per margin, and to be delivered, subject to the exceptions and conditions hereinafter

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mentioned, in the like good order and condition. Then appears: "The following are the exceptions and conditions above referred to, weight, measure, quality, contents and value unknown." The marks and numbers of the bags and pockets are stated in the margin, with the gross and net weight in kilograms, the latter being also expressed in imperial weight as 7144 tons 8 cwt. 3 qrs. 17 lbs. The bill of lading contains the words in writing, after the date and before the signature: "Freight and all other conditions and exceptions as per charter-party." The appellants contend that, having regard to the terms of the charterparty, the bill of lading incorporated the provision of clause 12 of it that the bills of lading are to be deemed conclusive proof of cargo shipped, and accordingly that the bill of lading in question must be deemed conclusive proof of cargo shipped, and that it was not competent for the arbitrator to entertain the question whether the quantity delivered by the ship was all the bags which it actually received, when the deficiency was included in the quantity stated in the bill of lading to have been shipped.

The respondents rely upon the clause in the bill of lading, "weight, measure, quality, contents, and value unknown," and they contend that with such a provision the bill of lading is not conclusive as to quantity shipped; they dispute the incorporation of the conclusive evidence clause, and moreover claim that if there is any discrepancy between the charterparty and the bill of lading the latter prevails.

Some suggestion was made during the hearing of the appeal that the bill of lading used in the present case was not in the common form known as Eastern trade bills of lading, but nothing turns upon this, as so far as the provision in question is concerned—"weight, &c., unknown"—it is not in dispute that it appears in every form of "Eastern trade bill of lading" produced to the Court. A clause in a bill of lading "weight, measure, quality, contents, and value unknown" will protect a shipowner against liability to an indorsee on the footing of estoppel as regards the weight, measure, &c., appearing in the bill of lading. The shipowner is bound to carry and deliver safely the goods received by him, whatever their weight, measure, &c., may be. But the description in the bill of lading amounts to no more than this—that the shipper represents that such and such are the weights, contents, &c., but that the owner has no

knowledge of the matter and does not admit the accuracy of this description. It is open to a shipowner to prove that the whole of the goods in fact shipped have been delivered, although the quantity so delivered is less than the quantity signed for by the master in the bill of lading. The bill of lading is only prima facie evidence against the shipowner and may be displaced: *Jessel* v. *Bath* (1); *Smith & Co.* v. *Bedouin Steam Navigation Co.* (2); *Compania Naviera Vasconzada* v. *Churchill & Sim.* (3) This is not in dispute. If the clause "weight, &c., unknown" is to apply and be given effect to, and the conclusive evidence clause is not incorporated, the claim of the appellants, which is as indorsees of the bill of lading, fails. The question, therefore, arises: Is the conclusive evidence clause incorporated in the bill of lading by the words "Freight and all other conditions and exceptions as per charter-party"? It was determined in *Serraino & Sons* v. *Campbell* (4) that the words "all other conditions as per charter" did not incorporate into the bill of lading an exception of stranding occasioned by the negligence of the master, which was included in and covered by a stipulation in the charter-party, "Negligence clause as per Baltic bill of lading, 1885." Lord Esher M.R. said (5): "After full consideration I think that the words ought to be construed as meaning all those conditions of the charter-party which are to be performed by the consignee of the goods. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee—indeed, they are not conditions which are to be performed by any one." The authorities on this subject were again reviewed in *Diederichsen* v. *Farquharson Brothers.* (6) The words in that case were "freight and all other conditions as per charterparty"; it was held that the omission of the words "they paying" or "paying" before "freight" made no difference; that the conditions of the charterparty incorporated into the bill of lading were limited to such as were to be performed by the consignee, and did not include the exemption of the shipowner from liability in respect of deck cargo, which the charterparty provided should be carried at merchant's risk. In that case A. L. Smith L.J., after referring to *Serraino & Sons* v. *Campbell* (4) and the rule of con-

(1) (1867) L. R. 2 Ex. 267.
(2) [1896] A. C. 70.
(3) [1906] 1 K. B. 237.
(4) [1891] 1 Q. B. 283.
(5) Ibid. 290.
(6) [1898] 1 Q. B. 150.

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struction there laid down, said (1): "Again in the year 1895, in *Manchester Trust* v. *Furness* (2), my brother Mathew treats this rule of construction as then well known and settled, as in truth it was; and in the same case upon appeal (3) the present Master of the Rolls, Sir Nathaniel Lindley, said, with reference to the words in a bill of lading 'they paying freight and other conditions as per charterparty': 'The effect of that reference has been considered more than once: it has been considered in *Serraino & Sons* v. *Campbell* (4) and also in *Fry* v. *Chartered Mercantile Bank of India* (5), and the effect of the reference is to incorporate so much of the charterparty as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for incorporating more than that.' If ever there was a rule of construction laid down and settled by overwhelming and conclusive authority, from the House of Lords downwards to the Court of first instance, it is this, and yet it is now insisted upon by the shipowner that when by his captain he signed the bill of lading in this case upon August 19, 1896, containing the words 'freight (in print) and all other conditions as per charterparty' the word 'paying' being left out, he, by so doing, incorporated into the bill of lading conditions which otherwise would not have been incorporated, and which it was well known would not be. With the contention that the word 'freight' does not mean 'paying freight' in this mercantile document, I cannot agree, for in my judgment the words 'freight' and 'paying freight' therein mean the same thing." The conclusive evidence clause is not therefore incorporated into the bill of lading as a "condition" of the charterparty. In the present case, however, "exceptions" as well as "conditions" are mentioned: "Freight and all other conditions and exceptions as per charter-party." This language will suffice to incorporate exceptions which are not inconsistent with the rest of the bill of lading. Is the conclusive evidence clause an exception? In my opinion it is not. The exceptions are provisions which limit the obligation of the shipowner or carrier to deliver the goods safely: he agrees to do this, unless prevented by excepted perils. The conclusive evidence clause is not an exception

(1) [1898] 1 Q. B. 154.
(2) [1895] 2 Q. B. 282, 286.
(3) [1895] 2 Q. B. 539, 545.
(4) [1891] 1 Q. B. 283.
(5) (1866) L. R. 1 C. P. 689.

or qualification of the shipowner's liability, but an extension of it; it renders him liable for goods stated to have been shipped on board, whether actually so shipped or not. But if contrary to my view the conclusive evidence clause is an exception, then I am of opinion that it is not incorporated, as it is inconsistent with and repugnant to the clause "weight, &c., unknown." In *Serraino & Sons* v. *Campbell* (1) the Court considered the decision of the Exchequer Chamber in *Gray* v. *Carr* (2), and Lord Esher said that the subsequent cases showed the practical mode of carrying out the principle of that decision is this (3): "You are first to read into the bill of lading all the conditions of the charterparty; if some of those conditions are so large as not to be applicable to a bill of lading at all, they are to be treated as inconsistent and must be struck out." The same principle is applicable to exceptions. Exceptions contained in the charterparty are to be read into the bill of lading, so far as not inconsistent with it. No exception can be introduced which would be repugnant to some provision already in the bill of lading. It would not, however, be repugnant to introduce an additional exception. There is nothing repugnant to a provision that a shipowner shall carry and safely deliver certain goods, unless prevented by certain named perils, to add "or unless prevented by certain other named perils." But there is a distinct contradiction between a clause "weight, contents, &c., unknown," thereby providing against any admission by the shipowner of weight or contents, and a provision in the bill of lading making the weight and contents specified in the bill of lading conclusive evidence against the shipowner and affecting him with knowledge of the weight and contents.

Moreover, clause 12 of the charterparty runs: "The captain to sign Eastern trade bills of lading . . . . and their conditions to form part of this charter-party." And in the bill of lading in question, and in all Eastern trade bills of lading, so far as we have been informed, where the shipowner agrees to deliver "subject to the exceptions and conditions hereinafter mentioned," the clause "weight, measure, quality, contents, and value unknown" is in terms expressed to be one of the exceptions or conditions "above referred to." The bill of lading ought not to be interpreted as having

(1) [1891] 1 Q. B. 283. (2) (1871) L. R. 6 Q. B. 522.
(3) [1891] 1 Q. B. 289.

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inconsistent provisions incorporated in it, if this can be avoided. In my judgment the conclusive evidence clause forms no part of the bill of lading in question, and accordingly this appeal fails, and should be dismissed.

SCRUTTON L.J. read the following judgment:—This is an appeal from a decision of Lush J., affirming in the result, with a trifling variation, but for different reasons, the decision of a legal arbitrator stated in the form of a special case.

Curiously enough the first difficulty is to decide who are the parties to the dispute. Lush J.'s decision is embodied in a judgment purporting to be between "The Hogarth Shipping Company and Blyth, Greene, Jourdain & Co., Limited," and the notice of appeal was given by Blyth, Greene, Jourdain & Co., receivers. But the pleadings in the arbitration and the decision of the arbitrator purport to be in an arbitration between the Hogarth Shipping Company and "The Royal Commission on the Sugar Supply, acting on behalf of the King." Blyth, Greene, Jourdain & Co. appear on the charter as charterers, and are found by the arbitrator to be agents for the Sugar Commission. The latter are alleged by the points of claim and admitted by the defence to be indorsees of the bill of lading, and are called by the arbitrator the receivers. No explanation was given to us of this change in the parties to the proceedings; I can only conjecture that it was thought undesirable to make orders for costs against a Royal Commission acting on behalf of the King, and I treat the party litigating with the shipowners as being in fact charterers and also receivers as indorsees under the bill of lading issued under the charter. The second difficulty is to decide what is the claim made which has been adjudicated upon by the arbitrator, formulated in the special case, and decided by Lush J. Is it a claim on the charter or on the bill of lading? For on consideration I agree with the view expressed by Bray J. in *S.S. Den of Airlie* v. *Mitsui & Co.* (1) that the issuing of bills of lading to a charterer, even though he has assigned them, does not necessarily terminate his rights under the charter. And I think it is, to say the least, very arguable that the charterer here might sue on the charter for failure to deliver, alleging that the clause in the

(1) (1912) 17 Com. Cas. 116, 121.

bill of lading, "weight, &c., unknown," was not a "condition," and, therefore, not incorporated in the charter.

I do not think the points of claim in themselves are sufficiently clear to exclude a claim under the charter; but Mr. Branson, for the goods owners, frankly admitted that this claim had not been argued before the arbitrator or before the learned judge below; nor did he himself raise it in this Court. Under these circumstances I do not think we ought to consider such a claim on appeal, though, speaking for myself, I should desire to reserve the question whether in a similar case to this such a claim properly raised should not succeed.

I approach the matter, therefore, as a claim under the bill of lading. This bill, though now presented by the charterer, was given to a vendor, who made the goods deliverable to his order. He therefore reserved the jus disponendi and was an independent contractor, and not merely an agent of the charterer. Under these circumstances I agree with the reasoning of Hamilton J. in *Steamship Calcutta Co.* v. *Weir & Co.* (1) that the indorsement of the bill to the charterer, when the latter claims on the bill of lading, does not alter or affect his rights, which are founded on and limited by the bill of lading.

Does, then, the bill of lading incorporate the "conclusive evidence" clause of the charterparty? It contains the clause "freight and all other conditions and exceptions as per charter." Whatever view one might take of the word "conditions" in the absence of authority, there is now a long line of decisions binding on this Court, and acted on for years by commercial men, that the word "conditions" usually only incorporates "conditions" to be performed by the consignee of the bill of lading, including therein obligations on the shipowner qualifying or relevant to such conditions: *East Yorkshire Steamship Co.* v. *Hancock.* (2) An attempt was made to enlarge the meaning of the word "conditions" in *Diederichsen* v. *Farquharson Brothers* (3), but the judgments of A. L. Smith M.R. and Collins L.J. point out where the long line of authorities and practice prevent such a meaning being given to the word "conditions." In the only case where the word "conditions" has been given a

(1) [1910] 1 K. B. 759, 770. (2) 5 Com. Cas. 266.
(3) [1898] 1 Q. B. 150.

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wider meaning—*The Northumbria* (1)—the wording of the clause was "all other conditions, including negligence clause," which showed that the parties were using "conditions" in a wider sense. The earliest cases in which this limitation was put on the word "conditions" were cases where it was sought to introduce "exceptions" to excepted perils for the consequences of which the shipowner was not liable from the charter into the bill of lading. To meet these decisions the wording of the clause was sometimes varied to read "all conditions and exceptions as per charter." It is arguable that, as in *East Yorkshire Steamship Co.* v. *Hancock* (2), obligations on the shipowner relevant to the conditions to be performed by the consignee were introduced by the word "conditions," so in this case the term "exceptions" introduces terms as to the shipowner's liability to which the exceptions apply. But on consideration I have come to the conclusion that the Court is not justified in straining the terms of a well-known clause to get a meaning, however reasonable, which the parties might quite well have expressed in plain language but have not. No one in ordinary language would call the "conclusive evidence clause" an "exception."

If the "conclusive evidence" clause is not incorporated, it is admitted the receivers cannot, on this bill of lading and on the facts found, succeed.

I regret this result; for it is difficult to believe that any sensible business people put the "conclusive evidence" clause into the charter in order that it should have no effect on the liability for cargo carried, but the result is due partly to the way in which the claim has been framed and argued, partly to the apparently incurable habit of commercial men of using two printed forms referring to each other without any clear thinking as to how much of each form they intend to be their bargain, especially when those forms contain phrases which have been the subject of settled judicial construction in the Courts for many years.

I agree, with some reluctance, that the appeal fails.

BRAY J. read the following judgment:—This is an appeal from a judgment of Lush J. on a special case stated by an arbitrator in an

(1) [1906] P. 292. (2) 5 Com. Cas. 266.

arbitration between Messrs. Blyth, Greene, Jourdain & Co., called in the special case the receivers, and the Hogarth Shipping Company, called the shipowners, in respect of a claim made by the former against the latter for short delivery of bags of sugar. The receivers were acting as agents for the Royal Sugar Commission. Nothing, however, seems to turn on that, but I agree with what has been said as to who are the real parties to this arbitration. The material facts were as follows: By a charterparty dated October 27, 1914, the shipowners, who owned a ship called the *Baron Napier*, agreed with the receivers, who were the charterers, that the ship should proceed to Port Louis, Mauritius, and there load a cargo of sugar in bags from the charterers, and therewith proceed to London, Liverpool, or other ports as ordered at a freight of 1*l.* 3*s.* 9*d.* per ton. By clause 12 it was provided: "The captain to sign Eastern trade bills of lading, which are to be deemed to be conclusive proof of cargo shipped, and their conditions to form part of this charterparty, at any rate of freight required by the charterers, without prejudice to this charterparty, but at not less than the average charter rate, unless the difference is paid in cash before signing, at current rate of exchange for ninety days' sight bank bills." The ship duly proceeded to Port Louis, Mauritius, and there loaded from a firm called Elias Mallac et Cie., stated to be acting for the Mauritius Commercial Bank, a full cargo of sugar. The captain signed the bill of lading presented to him by the shippers, which stated that there had been shipped 87,966 bags of sugar and 7453 pockets of sugar weighing 7144 tons 8 cwt. 3 qrs. 17 lbs. This bill of lading contained a provision that the cargo was to be delivered subject to the conditions and exceptions thereinafter mentioned. Amongst the conditions and exceptions were the following: "Weight, measure, quality, contents, and value unknown" (this was in print); then followed other exceptions, and just above the signature of the captain were the words (in writing) "Freight and all other conditions and exceptions as per charter-party." The ship proceeded to Manchester, and when she arrived there the number of bags and pockets was short of the numbers stated in the bill of lading by 160 bags and six pockets. The bill of lading had been indorsed by Mallac et Cie., the shippers, to the receivers, and when the bags had been counted the receivers made a claim against the shipowners for

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277*l.* 19*s.* 3*d.*, the value of the bags and pockets short delivered. The claim was disputed by the shipowners and was referred to arbitration, Mr. R. A. Wright being the arbitrator. After hearing the evidence he was requested to state his award in the form of this special case, and so stated this case. He found the facts I have mentioned, and also that in fact the ship had delivered all the sugar actually shipped and that there was no loss of sugar on the voyage or during discharge. The receivers contended that that finding was irrelevant, the shipowners being conclusively bound by the number stated in the bill of lading. Subject to the opinion of the Court the arbitrator decided that the bill of lading, by reason that the ship's obligation to make delivery thereunder was expressly subject to the condition that the weight was unknown, could not be construed as a bill of lading conclusive as to the cargo shipped, and that it could not be construed as conclusive as to the number of bags stated while not conclusive as to the weight of the cargo.

Lush J. held that it was conclusive as to the number of bags, but not as to the contents, and under paragraph 13 of the award held that the shipowners must give credit to the receivers against the freight for 4*l.* 2*s.* 5*d.*, the value of the bags, but no more.

A question arose before us as to whether the claim was on the charterparty or the bill of lading. I think the appellants' counsel admitted that the claim was on the bill of lading, but, however that may be, I think it is clear that it was so—it was a claim by Blyth, Greene, Jourdain & Co. *as receivers*. The recitals in the award state that the dispute was between the shipowners and the receivers. The award is that the receivers are not entitled (see also paragraphs 12 and 13). They are called throughout receivers, and they were the holders of the bill of lading, which, as I have already stated, had been indorsed to them by the shippers. The first question, therefore, to be considered is whether the 12th clause of the charterparty was incorporated in the bill of lading under the words "freight and all other conditions and exceptions as per charter-party." The 12th clause is not, in my opinion, an exception. The word "exceptions" in a bill of lading usually means what are called "the excepted perils." They are exemptions in favour of the shipowner from his liability to safely carry and deliver, but if they include exemptions in favour of the consignees they cannot include a provision like

this, which imposes an additional liability on the part of the shipowner. It is alleged to be a condition. Now, the meaning of these words "freight and all other conditions as per charter-party" has been discussed in many cases. The effect of these words is summed up by Mr. Carver in his work on Carriage by Sea, art. 160, thus: "The context must in each case be looked at, but the general result of the cases is that the words mean all those conditions of the charterparty which are to be performed by the consignee of the goods or which relate to the mode of delivery to him by the shipowner." He refers to *Serraino & Sons* v. *Campbell.* (1) In that case the question was whether the words included what was really an exception. That could not arise here, because the word "exceptions" is added; but Lord Esher M.R. said (2): "After full consideration, I think that the words ought to be construed as meaning all those conditions of the charterparty which are to be performed by the consignee of the goods." Reliance is placed on the words "paying freight"; but in *Diederichsen* v. *Farquharson Brothers* (3) the word "paying" was absent, yet the Court of Appeal held that that made no difference. Collins L.J. says, after citing with approval Lord Esher's judgment (4): "The ground on which this rule rests is that, inasmuch as freight has to be paid by the consignee as a condition of receiving the cargo, the words 'other conditions' are to be read in their natural meaning, and, following upon the word 'freight,' must be taken to import conditions to be performed by the consignee in relation to the receiving by him of the cargo. I think it can make no possible difference to this construction that the words 'payment of' before 'freight' are omitted. 'Freight,' in my judgment, is obviously equivalent to 'payment of freight' or 'he or they paying freight'; otherwise it could not be described as a condition so as to justify the words 'other conditions' which follow it. The canon of construction above stated is, therefore, applicable to this bill of lading, and excludes all terms of the charterparty which cannot be brought under the category of conditions to be performed by the consignee. It has been urged that the absence of exceptions in the bill of lading is a reason for giving a larger interpretation to the words 'all other

(1) [1891] 1 Q. B. 283.
(2) Ibid. 290.
(3) [1898] 1 Q. B. 150.
(4) Ibid. 162.

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conditions as per charterparty.' In my judgment, this fact can make no difference, the basis of the rule being what I have stated."

In *Manchester Trust* v. *Furness* (1) Lindley L.J. deals with the argument that the holder of the bill of lading takes it with notice of the charterparty, and, after referring to *Serraino & Sons* v. *Campbell* (2) and saying that these words only refer to conditions to be performed on the delivery of the cargo, says that there is no authority whatever for incorporating more than that, and the equitable doctrine of notice has no application to commercial transactions. In the above cases the words "and exceptions" were not there, but I do not think that the addition of those words can enlarge the meaning of the word "conditions." Having regard to the canon of construction laid down by those cases, it remains to be seen whether the 12th clause of the charterparty falls within it. It is clear, I think, that it does not. It is not a condition to be performed by the consignee, nor one to be performed on the delivery of the cargo. It relates to the form of the bill of lading which the captain is to sign, and it is an agreement between the shipowners and the charterer that the bills of lading are to be deemed conclusive evidence of the cargo shipped and that their conditions should form part of the charter party. It is not really a condition to be performed by any one. It is a term of the contract—a stipulation. No doubt the charterparty forms a good and binding agreement between the parties to the charterparty, but it is not an agreement to which the shipper or the holder of the bill of lading is made a party, and if this provision is not incorporated into the bill of lading it gives no rights to the holder of the bill of lading. The cases in which the shipowner has been held bound by this agreement are either cases between the shipowner and charterer, such as *Lishman* v. *Christie & Co.* (3), or cases where it has been admitted that the clause was incorporated into the bill of lading, such as *Mediterranean and New York Steamship Co.* v. *Mackay.* (4) But suppose this 12th clause is incorporated into the bill of lading. Then there come to be considered the words already in the bill of lading "weight, measure, quality, contents and value unknown." These words have also been the subject of decision.

(1) [1895] 2 Q. B. 539.
(2) [1891] 1 Q. B. 283.
(3) (1887) 19 Q. B. D. 333.
(4) [1903] 1 K. B. 297.

In *Jessel* v. *Bath* (1) it was held that these words controlled the statement of the weight. Bramwell B. said (2): "This document, though apparently contradictory, means this—a certain quantity of manganese has been brought on board which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct"; and Martin B. says (3): "The person, therefore, signing the bill of lading, by signing for the amount with this qualification, 'weight, contents and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter." So that if the 12th clause is to be considered as incorporated an inconsistency at once arises. In one part of the bill of lading the captain says: "I will not agree to be bound by the weights, measures, &c., given to me by the shipper," and in another part, i.e. the part which is said to incorporate the 12th clause, we have him saying: "I agree to be bound by the weights in the bill of lading." Can they be reconciled? Lush J. thinks they can by holding that the shipowner is bound by the statement as to the number of bags, but not bound by the statement that they contain sugar. I cannot say that I am satisfied with that construction. It is impossible to believe that this is what the parties intended. I think they cannot be reconciled, and this furnishes an additional reason for holding that the parties did not intend that the 12th clause should be incorporated. But if it is incorporated and the two are not reconcilable, which is to prevail? I think the words appearing in the bill of lading itself. They are words, as I have pointed out, which have received a clear judicial interpretation, and they cannot, I think, be controlled by such general words as "all other conditions and exceptions as per charterparty." The clear and express clause must prevail. I have so far assumed that this is not to be treated as a claim by the charterers under the charterparty, but if it is, the same difficulties and inconsistencies will arise. Now, we find that the shippers presented a bill of lading for the captain to sign which contains this clause, that the weights, &c., shall not be conclusive. How came this to be done? We do not know; nor do we know what was the transaction between the

(1) L. R. 2 Ex. 267. (2) Ibid. 274.
(3) Ibid. 273.

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Bray J.

shipper and the charterers or receivers. It seems to me under all these circumstances we ought not to hold that the shipowner is bound by a clause which prevents him from setting up the true facts. The charterers or receivers have their remedy against the shippers, unless they have precluded themselves by agreeing to accept the bill of lading weight as conclusive, and, even if they have so agreed, they may be able to throw the blame on the shippers for presenting to the captain for signature a bill of lading in this form. The justice of the case seems to lie with the shipowners. I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Waltons & Co.*
Solicitors for respondents: *Botterell & Roche.*

W. J. B.

1917 *May* 23.

In re AN ARBITRATION BETWEEN UNIONE STEARINERIE LANZA AND WIENER.

Arbitration—Power of Arbitrator to order Party to give Security for Costs—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 2, *First Schedule, clauses* (*f*), (*i*).

An arbitrator under a submission by agreement out of Court has no power to make an order for security for costs.

SPECIAL CASE stated by an arbitrator under s. 19 of the Arbitration Act, 1889.

By an agreement made between Unione Stearinerie Lanza, of Turin and Genoa in the kingdom of Italy, incorporated according to the laws of the kingdom of Italy (hereinafter called the buyers), and Robert Otto Wiener, carrying on business in the city of London (hereinafter called the seller), certain disputes regarding the alleged failure of the seller to perform a contract for the sale of 400 barrels of animal fat were agreed to be referred to arbitration as therein set out. It was subsequently agreed that the determination of the disputes under the agreement should be referred to the arbitrator sitting alone.

Points of claim on behalf of the buyers claiming 794*l.* 9*s.* 6*d.*

as damages by reason of the alleged failure of the seller to deliver the fat and points of defence thereto by the seller denying all liability having been delivered, an application was made on behalf of the seller to the arbitrator to direct that the buyers should give security for the costs of the seller in the arbitration.

The application was supported by a statutory declaration made by the seller which stated that the buyers were a company incorporated according to the laws of the kingdom of Italy, and that they carried on business in the cities of Turin and Genoa as candle and soap manufacturers, and had no branch in this country and did not possess any assets within the jurisdiction of the English Courts. The declaration further stated that the seller was advised and believed that he had a good defence to the claim, and that he had had and would have to incur heavy expenses in conducting his defence and obtaining evidence, and that the buyers had refused to give security for costs. The application was opposed by the buyers on the ground that the arbitrator had no power to direct them to give the security.

The question of law for the opinion of the Court was whether the arbitrator had power to order the buyers to give security for costs of the seller in the arbitration.

Greer, K.C., and *Caradoc Rees*, for the seller. The question is whether where there is an arbitration under a submission by agreement out of Court—not a reference by order of the Court—the arbitrator has power to order a party to give security for costs. By s. 2 of the Arbitration Act, 1889, "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission"; and by the First Schedule, clause (*f*), "The parties to the reference . . . . shall, subject to any legal objection, submit to be examined by the arbitrators or umpire . . . . and do all other things which during the proceedings on the reference the arbitrators or umpire may require." That is the widest possible language. Further, clause (*i*) provides that the "costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or

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any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client." Those two clauses give the arbitrator the widest possible jurisdiction over costs, and there is nothing to indicate that the jurisdiction is not to include the power to order security for costs. In *In re Crighton and Law Car and General Insurance Corporation* (1) it was laid down by Scrutton J. that an arbitrator has a discretion both by his inherent powers as a judicial officer and under s. 2 coupled with the First Schedule, clause (*f*), of the Arbitration Act, 1889, to allow an amendment of pleadings delivered by the parties in compliance with a direction given to them by him. Upon the same principle he has the power to order security for costs. In *In re Pretoria-Pietersburg Ry. Co.* (2) Buckley J. held that he could order a creditor residing out of the jurisdiction who made an application in a voluntary winding up to give security for costs. Order LXV. of the Rules of the Supreme Court, 1883, assumes that a judge of the High Court has inherent jurisdiction to make an order. No doubt there must be some limitation to the arbitrator's power. He could not, for instance, imprison for contempt or issue an injunction. An arbitrator can make any order that is incidental to the determination of the dispute, and ordering security for costs may be incidental to his doing what is fair between the parties. There is no reason why the language in clauses (*f*) and (*i*) of the First Schedule should be cut down in a manner which would deprive an arbitrator of a very useful power. [*In re Enoch and Zaretzky, Bock & Co.* (3) was also referred to.]

R. A. Wright, for the buyers, was not called upon.

VISCOUNT READING C.J. The sole question before the Court is whether an arbitrator under an agreement to submit differences to arbitration has power to order a party in the position of a plaintiff to give security for costs.

The buyers, who were the claimants, and therefore in the position of plaintiffs, were a foreign corporation which, in the ordinary course of an action, would have been ordered on the defendant's application to give security for costs, and the proceedings would have been stayed

(1) [1910] 2 K. B. 738. (2) [1904] 2 Ch. 359.
(3) [1910] 1 K. B. 327.

until the order of the Court to that effect had been complied with. The arbitrator doubted whether he had the power to make the order; and we are told in fact he thought he had not the power. In my judgment he was right, and there is no such power in an arbitrator. He could have been given the power by express agreement between the parties, but it is not suggested that there was any agreement to that effect. It is said that it is to be gathered from the terms of s. 2 of the Arbitration Act, 1889, and clauses (*f*) and (*i*) of the First Schedule to the Act that the arbitrator has the power. Under clause (*f*) it is provided that the parties to the reference shall submit to be examined by the arbitrators or umpire, shall produce books, documents, and so forth within their power, and at the end of the clause there are the words "and do all other things which during the proceedings on the reference the arbitrators or umpire may require." It has been held in *In re Crighton and Law Car and General Insurance Corporation* (1) that an arbitrator has a discretion to allow an amendment of pleadings delivered by the parties in compliance with a direction given to them by him, and reliance is placed upon the language used by Scrutton J. in giving judgment in that case. He said (2): "A dispute or difference having arisen, a member of the Bar was appointed arbitrator, and he ordered the parties to define the difference by delivering to each other points of claim and defence. In my view he had a right to do that, both by his inherent powers as a judicial officer and under s. 2, coupled with the First Schedule, clause (*f*), of the Arbitration Act, 1889." I merely refer to that passage because we have on behalf of the seller been pressed by Mr. Greer with the reference to the "inherent powers" of an arbitrator "as a judicial officer." I do not think that Scrutton J. meant by those words to imply that an arbitrator under a submission by agreement was in the same position as and had all the powers of a judge. I think he meant that he had power to ascertain the facts, and, under clause (*f*), power to order points of claim to be delivered, and, that that being so, he must have the power also, sitting as the person to decide the questions, to allow an amendment. I do not think he meant anything more than that.

The words in clause (*f*) of the First Schedule, upon which reliance was mainly placed, do not give the power to order a stay of pro-

(1) [1910] 2 K. B. 738. (2) [1910] 2 K. B. 745.

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ceedings pending the giving of security for costs. They are words of general import giving to the arbitrator the power to do anything which he may require for the purpose of ascertaining facts or law in order that he may decide the dispute. It would be a very wide extension of them to construe them as meaning that he has the powers of a judge as to staying proceedings pending the giving of security for costs. I do not think that would be a reasonable construction of the language of the clause. Obviously the words cannot mean that an arbitrator has all the powers of a judge, because in that case he would have the power to commit for contempt of Court in his presence and to issue a writ of attachment for default in compliance with an order made by him. It is not contended that an arbitrator has any such powers, and it is quite clear that he has not. Consequently it is apparent that the words of clause (*f*) cannot be read as if they gave the arbitrator the power of a judge, and they must therefore be read subject to some limitation, and that limitation is that the arbitrator may order the parties to do all such things as he may require in order to assist him in arriving at a determination of the dispute. The dispute obviously can be determined whether security for costs be given or not. The object of the application for security for costs is not to enable the proceedings to continue in order that it may be determined by the reference whether there is a valid claim by the party in the position of a plaintiff, but to put an obstacle in the way of his proceeding until he has done an act which will provide security to the party in the position of the defendant that, should he obtain an order for costs, the amount will be paid. That has nothing whatever to do with the arbitrator ascertaining the true position between the parties in order to determine the case.

The only other ground upon which it was suggested that the arbitrator possesses this power is that it is given by clause (*i*) of the First Schedule coupled with s. 2. It is sufficient for me to say that that clause deals with the costs which are to be paid, and gives the arbitrator full discretionary power with regard to those costs. The words relied upon on behalf of the seller are: "The costs of the reference . . . . shall be in the discretion of the arbitrators or umpire, who may direct . . . . in what manner those costs or any part thereof shall be paid . . . . ." To order a stay of proceedings

pending the giving of security for costs is clearly not an order directing how the costs are to be paid, but, on the contrary, it is something which precedes at the very outset of the reference the ascertainment of the facts upon which the arbitrator would exercise his discretion. I am clearly of opinion that s. 2 coupled with clause (*i*) does not give the power, and that there is nothing in the Arbitration Act, 1889, which confers it, and that it is a power which is in the inherent jurisdiction of a judge of the High Court, but does not extend to an arbitrator.

For these reasons I think that the question put by the learned arbitrator is to be answered in the negative.

AVORY J. I am of the same opinion. In my judgment, unless this power can be found in clause (*f*) of the First Schedule coupled with s. 2 of the Arbitration Act, 1889, it does not exist, and the words "do all other things which during the proceedings on the reference the arbitrators or umpire may require" are qualified by the words "subject to any legal objection" which occur earlier in that paragraph. It is obviously a legal objection to the arbitrator making this requirement that he has no power to do it. I am of opinion that he has not the power, and therefore that clause (*f*) does not assist the seller.

SHEARMAN J. I am of the same opinion, and I have nothing to add.

Question answered in negative.

Solicitors for buyers: *Parker, Garrett & Co.*
Solicitors for seller: *Hyman Isaacs, Lewis & Mills.*

J. E. A.

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May 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24.

[IN THE COURT OF APPEAL.]

NEVILLE *v.* LONDON EXPRESS NEWSPAPERS, LIMITED.

[1916 N. 83.]

Maintenance of Suit—Maintained Action successful—Liability of Maintainer.

An action for maintenance of a suit will lie although the maintained action has been decided in favour of the plaintiff in that action.

Oram v. *Hutt* [1914] 1 Ch. 98 followed.

Decision of Viscount Reading C.J. [1917] 1 K. B. 402 affirmed on this point.

APPEAL from the decision of Viscount Reading C.J.; reported [1917] 1 K. B. 402.

The defendants were the proprietors and publishers of a daily newspaper called the *Daily Express* circulating throughout England and Wales. Shortly before January, 1916, the plaintiff Neville, trading as the South Coast Land and Resort Company, promoted and advertised a prize competition, by which a prize of 100*l.* was offered for the most suitable name for a "new south coast estate," and in addition fifty free plots of land on the estate were offered as consolation prizes, subject to a proviso that the winners of these consolation prizes paid three guineas for a deed of conveyance. The prize of 100*l.* was divided between two competitors who had submitted "New Anzac-on-Sea" as a name for the estate.

The competition was criticized in a series of articles published in the *Daily Express*, which alleged, in substance, that the competition was not a bona fide one, that far more than fifty consolation prizes had been awarded, and that the plots of land were of little or no value. It was stated in some of the articles that the defendants were prepared to instruct their solicitors to take legal proceedings, at the defendants' expense, on behalf of persons who had been awarded plots of land as consolation prizes and who had paid the sum of three guineas for a deed of conveyance, for the recovery of these sums, and all persons desiring to get their money back were invited to send their names to the defendants' solicitors. As a result 125 persons joined together in two actions brought in the

Chancery Division [1916 B. 411] and [1916 P. 245] against Neville claiming the return of the money paid by them on the ground that they had been induced to pay the money by the fraudulent misrepresentation of Neville. The defendants' solicitors acted for the plaintiffs. These actions came on for trial before Younger J. Before the plaintiffs' case had been opened Neville's counsel stated that he would submit to judgment for the sums paid, but counsel for the plaintiffs contended that he was entitled to open the case. Younger J. held that he was entitled to do so, and Neville's counsel, acting on his client's instructions, withdrew from the case. The trial of the action then proceeded, and in the result Younger J. gave judgment for 114 of the plaintiffs (eleven having withdrawn) for the return of the money paid by them, with costs.

In the present case the plaintiff alleged that the articles in the *Daily Express* were defamatory of him and that the actions in the Chancery Division had been maintained by the defendants. The statement of claim alleged (inter alia) that "the defendants maliciously and with intent to injure the plaintiff procured divers persons . . . . to join in and bring two actions in the Chancery Division of the High Court of Justice and to permit the use of their names for the purpose of the said actions being brought against the plaintiff and the defendants have maliciously and with such intent as aforesaid maintained the said persons in the said actions and in the bringing and conduct thereof and have paid and are paying the costs of the said persons in and in relation thereto."

The defendants by their defence, after traversing these allegations, pleaded alternatively that "the said actions were proper and necessary actions brought in the public interest as well as in the interest of the said persons, and the defendants were entitled to maintain the said persons in the said actions inasmuch as it was their public duty to do so, or, alternatively, because they bona fide believed that it was their public duty to do so, and also because they acted out of charity and benevolence towards the said persons who were unable to bear the expenses and costs of the said actions."

The jury found for the plaintiff on the question of libel, with damages 300*l*.

On the claim for maintenance the following questions were left to the jury:—

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1. (*a*) Did the defendants act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights ?

(*b*) Did the defendants act solely from this desire ?

2. Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville ?

The jury answered all the questions in the negative.

Viscount Reading C.J. gave judgment for the plaintiff. (1) The defendants appealed.

Ernest Pollock, K.C., and *Sir Hugh Fraser*, for the defendants.

Lewis Thomas, K.C., and *H. Dobb*, for the plaintiff.

The arguments on the question of maintenance are given in extenso in the report of the case below, and it is unnecessary to repeat them here. The following cases were cited :—*Bradlaugh* v. *Newdegate* (2) ; *Pierson* v. *Hughes* (3) ; *Master* v. *Miller* (4) ; *Rex* v. *Davies* (5) ; *Wallis* v. *Duke of Portland* (6) ; *Goodright* v. *Forester* (7), *Findon* v. *Parker* (8) ; *Pechell* v. *Watson* (9) ; *Flight* v. *Leman* (10) ; *Oram* v. *Hutt* (11) ; *Harris* v. *Brisco* (12) ; *Alabaster* v. *Harness* (13) ; *Cotterell* v. *Jones* (14) ; *Holden* v. *Thompson* (15) ; *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.* (16) ; *Scott* v. *National Society for Prevention of Cruelty to Children* (17) ; *Hutley* v. *Hutley*. (18)

SWINFEN EADY L.J. said that, after careful consideration of the evidence on the claim for libel, he was of opinion that the verdict was one which a jury, viewing the whole of the evidence reasonably, could not find, within the principle laid down by the House of Lords in *Metropolitan Ry. Co.* v. *Wright* (19) ; there must therefore be a

(1) [1917] 1 K. B. 402.
(2) (1883) 11 Q. B. D. 1.
(3) (1672) 1 Freem. Ch. 71.
(4) (1791) 4 T. R. 320, 340.
(5) [1906] 1 K. B. 32, 43.
(6) (1797) 3 Ves. 494, 501.
(7) (1809) 1 Taunt. 578.
(8) (1843) 11 M. & W. 675.
(9) (1841) 8 M. & W. 691.
(10) (1843) 4 Q. B. 883.
(11) [1914] 1 Ch. 98.
(12) (1886) 17 Q. B. D. 504.
(13) [1894] 2 Q. B. 897 ; [1895] 1 Q. B. 339.
(14) (1851) 11 C. B. 713.
(15) [1907] 2 K. B. 489.
(16) [1908] 1 K. B. 1006.
(17) (1909) 25 Times L. R. 789.
(18) (1873) L. R. 8 Q. B. 112.
(19) (1886) 11 App. Cas. 152.

new trial on the claim for libel. As regarded that part of the claim which was founded upon maintenance, it had been contended that the action would not lie, because the maintained action had been successful; but this Court was compelled by *Oram* v. *Hutt* (1), a decision which was binding on them, to hold that, although the maintained action was successful, an action for maintenance would nevertheless lie. An action for maintenance would lie unless the defendants could bring the case within the exceptions in *Alabaster* v. *Harness* (2), one of which was the giving of legal assistance to a person who would otherwise, by reason of the expense, be unable to bring the action himself. Upon considering the evidence on this part of the case it was plain that the verdict of the jury, as shown by the negative answer given by them to the question "Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville?" was perverse, and could not possibly stand; there must therefore be also a new trial of the claim founded upon maintenance.

SCRUTTON L.J. and BRAY J. agreed.

New trials ordered.

Solicitors for plaintiff: *Vaughan & Williams.*
Solicitors for defendants: *Carter, Harrison & Armstrong.*

(1) [1914] 1 Ch. 98. (2) [1895] 1 Q. B. 339.

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May 22, 23, 24;
June 12.

NESBITT AND OTHERS *v.* MABLETHORPE URBAN DISTRICT COUNCIL.

[1916 N. 195.]

Seashore—Sandhills adjoining Shore—Ownership of—Sandhills under "view, cognizance, or management" of Commissioners of Sewers—Sewers Act, 1833 (3 & 4 *Will.* 4, *c.* 22), *ss.* 10, 47.

Sandhills formed by the forces of nature above high-water mark adjoining the shore at Mablethorpe, which served as a protection against the inroads of the sea, were subject to the jurisdiction of the Commissioners of Sewers, who, from time to time, repaired the same and on which they refused to allow the erection of any permanent structure without their licence. The Commissioners, however, made no claim to the ownership of the sandhills except in places where they had erected toolsheds and where they had executed works of a permanent character. The plaintiffs, as the owners of adjoining inlands, claimed to be the owners of the sandhills. The conveyance to them of the adjoining inlands made no mention of the sandhills, but they had exercised certain acts of ownership thereon:—

Held—(1.) that although the sandhills were under the "view, cognizance, or management" of the Commissioners of Sewers within the meaning of that expression in s. 47 of the Sewers Act, 1833, that section did not vest the property in the sandhills in the Commissioners; (2.) that the grant to the plaintiffs of the adjoining inlands did not pass the property in the sandhills; but (3.) that the plaintiffs had acquired a title by prescription to the sandhills by exercising acts of ownership thereon, notwithstanding the fact that the Commissioners of Sewers had refused to allow them or their lessees to erect permanent structures thereon without licence.

Stracey v. *Nelson* (1844) 12 M. & W. 535 followed.

West Norfolk Farmers' Manure Co. v. *Archdale* (1886) 16 Q. B. D. 754 distinguished.

ACTION tried by Bailhache J.

The facts are summarized in the head-note and are fully stated in the judgment.

Compston, K.C., and *Addington Willis* (for *Lawton*, serving with His Majesty's Forces), for the plaintiffs.

Hughes, K.C., and *Jeeves*, for the defendants.

Cur. adv. vult.

June 12. BAILHACHE J. read the following judgment:—This is the first of a series of actions brought by the plaintiffs and other persons upon compensation awards made in their favour in respect of the taking by the defendants of a stretch of sand dunes at Mablethorpe in Lincolnshire. The defendants in all the cases dispute the title of the various plaintiffs, all of whom claim to be owners of the sandhills upon the ground that they are the owners of the lands adjoining on the landward side, or, as I shall hereafter refer to them, the adjoining inlands.

The facts in every case differ somewhat, and, although I shall deal with the general principles applicable to the claims and defences in this case, I shall have to deal separately with the distinguishing facts.

The general history common to all the cases is this: There is at Mablethorpe above high-water mark a long stretch of sandhills which serve as a protection from the inroads of the sea. These sandhills are subject to the jurisdiction of the Commissioners of Sewers constituted under an Act 23 Hen. 8, c. 5, and the Commissioners are charged with their maintenance and upkeep. The sandhills are natural—that is to say, they are not the result of artificial works, but have been formed by the forces of nature. There was a suggestion that the Romans built a seawall which may or may not have assisted in their formation, but the evidence in support was not convincing, and in any case that was so long ago as not to be now material or relevant. The Commissioners from time to time repair the sandhills by placing faggots to collect sand and in other ways, and they have here and there toolsheds on the dunes. They also prevent any acts likely to be detrimental to the sandhills, and do not allow any erections upon them without their consent and licence. The terms of the licence oblige the owner to remove the erection at short notice. They make no claim to the ownership of the sandhills except in such places as they have their sheds or where they have done work of a permanent character. People may wander about the sandhills at their pleasure.

In 1914 the defendants obtained an Act vesting the sandhills in them. The preamble, after referring to the Commissioners of Sewers, declares that it is desirable that the sandhills should be vested in the defendants free from all interests and rights claimed

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by the owners of adjoining inlands, to whom compensation is to be made for such rights and interests as exist. The Act preserves the rights of the Commissioners, and provides for the payment of compensation to any person owning any part of the sandhills or having any interest therein at the passing of the Act, and also provides for the sending in of notices of claim. The Act received the Royal assent on July 8, 1914. I shall have occasion to refer to some of its provisions in detail. Notices were sent in by the plaintiffs in this series of actions. The parties proceeded to arbitration to assess compensation, and awards were made upon the footing that the claimants were the owners. So much for the general history.

Turning now to the facts of this particular action. The plaintiffs' claim is in respect of a stretch of sandhills No. 9 upon the map, and in the arbitration proceedings and in the course of the trial. No. 9 has a length, I am told, of from 600 to 700 yards, and the plaintiffs hold the inlands under two titles—one title which covers the whole length except about 77 yards at the northern end, and another title covering these 77 yards. The award upon which this action is based is dated August 31, 1915, and the arbitrator has awarded the plaintiffs one sum of 679*l.* 5*s.* in respect of the whole claim.

The title to the long parcel, with which I will deal first, is a conveyance in fee simple to the plaintiffs' predecessors from one William Hyde dated July 16, 1885, and the land is described as 4 acres 2 roods more or less; about an acre of this is a field, and the rest is a long parcel of land some 600 yards in length and not more than 15 yards wide in any part. The shape is peculiar, and to account for it, and because the matter is in other respects important, I must advert to another fact. The Commissioners had long ago constructed a drain or cut to drain the inlands of Mablethorpe. That cut was of somewhat irregular contour, but roughly ran parallel to the sea with outlets into the sea. In 1802 the parish or township of Theddlethorpe desired to have a similar drain or cut, and the work was undertaken by the Commissioners, who took the opportunity of straightening the old cut and slightly altering its position. The old cut was filled in, and I have no doubt the parcel of land in question acquired its shape because it to a large extent occupies the site created by these operations. I ought perhaps to

mention that there is a road called Furlong Road at the foot of the sandhills between the land belonging to the plaintiffs and the sandhills, but it was not suggested that this had any practical bearing on the case.

Upon these facts the plaintiffs claim that at common law the adjoining sandhills belong to them as owners of the adjacent inlands.

The conveyance under which the plaintiffs derive title makes no mention of the sandhills, and the plaintiffs say that if they are wrong in their view of the common law they have acquired a possessory title by exercising acts of ownership over the sandhills. For this purpose they rely upon the following facts: In 1887 they let a piece of the sandhills to a man named Leak for a garden, and he or his successors were still in occupation in 1914. In 1901 they let a site for a girls' summer school for ninety-nine years, and in 1888 to the Lifeboat Institution for a rocket post. They let the inlands to a man named Bishop, who in his turn let sites on the sandhills for tents, and in 1912 to the defendants for a shelter as yearly tenants. For two years an earlier tenant named Gray let the shooting rights to a man named Winfrey. Winfrey shot over the sandhills and posted notices on them warning poachers, and on two separate occasions in 1893 and 1898 poachers were prosecuted and convicted. The licence of the Commissioners of Sewers was obtained for the erection of the permanent structures.

The plaintiffs further say that if more is needed the defendants are estopped from denying their title to the freehold because at the passing of the Act of 1914 they were sub-tenants of the plaintiffs by virtue of the letting to them by Bishop.

The rights of the parties are to be determined as at the date of the passing of the Act of 1914 to which I have referred.

The question I have to decide is whether at that date the freehold of the sandhills adjoining the plaintiffs' inlands, the subject of the conveyance of July 16, 1885, was or was not at that date vested in the plaintiffs.

The sandhills in question were doubtless formed gradually and over a long period of time, and there appears to be no doubt that prior to 1833 these sandhills belonged to the owners of the adjoining inlands. This is in accordance with the law as stated by Mr. Callis, who was himself a Commissioner of Sewers, in his Lectures on Sewers

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when Reader at Gray's Inn in the early part of the seventeenth century (see pp. 65 and 90 of Mr. Brodrip's edition of those Lectures); and Best C.J., in delivering the answer of the judges to a question put to them in the House of Lords in the case of *Gifford* v. *Lord Yarborough* (1), expressed the view that land, not suddenly left derelict, but formed by alluvion of the sea, imperceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the Crown. This opinion the House of Lords adopted.

The defendants do not deny this proposition, but they say that as the sandhills are and have been for long subject to the active jurisdiction of the Commissioners of Sewers they became vested in the Commissioners on the passing of the Sewers Act, 1833 (3 & 4 Will. 4, c. 22). This contention depends upon the construction to be put upon s. 47 of the Act, but I ought in passing to refer to s. 10 as well. Sect. 10 reads thus: "And whereas doubts have arisen as to the extent of the jurisdiction of Commissioners of Sewers; be it therefore further enacted and declared, that all walls, banks, culverts, and other defences whatsoever, whether natural or artificial, situate or being by the coasts of the sea, and all rivers, streams, sewers, and watercourses which now are or hereafter shall or may be navigable, or in which the tide now does or hereafter shall or may ebb and flow, or which now do or hereafter shall or may directly or indirectly communicate with any such navigable or tide river, stream, or sewer, and all walls, banks, culverts, bridges, dams, floodgates, and other works erected or to be erected in, upon, over, or adjoining to any such rivers, streams, sewers, or watercourses, shall be from henceforth, to all intents, constructions, and purposes, within and subject to the jurisdiction of Commissioners of Sewers: Provided always, that nothing herein contained shall authorize or empower any Commissioners of Sewers to exercise authority or jurisdiction upon or over any dams, floodgates, or other works erected for the purpose of ornament, previous to the passing of this Act, in, upon, or over, any rivers, streams, ditches, gutters, sewers, or watercourses near or contiguous to any house or building, or in any garden, yard, paddock, park, planted walk, or avenue to a house, without the consent in writing of the owner or proprietor thereof respectively first had and obtained." Sect. 47 is in these

(1) (1828) 5 Bing. 163.

terms: "And be it further enacted, that the property of and in all lands, tenements, hereditaments, buildings, erections, works, and other things which shall have been or shall hereafter be purchased, obtained, erected, constructed, and made by or by the order of, or which are or shall be within or under the view, cognizance, or management of any Commissioners of Sewers, with the several conveniences and appurtenances thereunto respectively belonging, and also all and singular the goods, tools, utensils, materials, and things whatsoever had and to be had, bought, procured, or provided by or by the order of, or which are or shall be within or under the view, cognizance, or management of such Commissioners, shall be and the same are hereby vested in the Commissioners of Sewers within or under whose view, cognizance, or management such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things shall respectively be, who are hereby empowered to bring or cause to be brought any action or actions, or to prefer or order the preferring of any bill or bills of indictment, against any person who shall dig up, break or pull down, damage, destroy, injure, spoil, steal, take or carry away, or wilfully and wrongfully buy or receive, any such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things whatsoever as aforesaid, or any part thereof; and in every such action and indictment the said lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things shall be laid or described to be the property of the said Commissioners, without stating or specifying the name or names of all or any of such Commissioners." Now, if one reads s. 47 literally as drawn, and unaided by authority, it seems tolerably clear that the property in these sandhills, which are under the "view, cognizance, or management" of the Commissioners of Sewers, vests in them, and if in them ceases to be in the plaintiffs as owners of the adjoining inlands. But the point is covered by express authority. It was decided in 1844 by the Court of Exchequer in *Stracey* v. *Nelson* (1) that s. 47 does not vest in the Commissioners sandhills such as those now under discussion. That action was brought in the name of one of the Commissioners against the defendant for trespass in entering upon certain sandhills bordering on the sea and

(1) 12 M. & W. 535, 544.

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removing rabbit traps set there by the Commissioners of Sewers. The defendant alleged that he was not a trespasser as he was acting on behalf of a tenant of Lord Winterton, in whom the ownership of the soil was vested as the owner of the adjoining inlands. The Commissioners in that case as in this had often repaired the sandhills so as to render them a barrier against the encroachments of the sea. The position and nature of the sandhills and the acts of the Commissioners in relation thereto were indistinguishable from those in the present case. The Court consisted of Lord Abinger C.B. and Parke, Alderson and Gurney BB. Judgments were delivered by the Chief Baron and Parke B. The Court decided that s. 47 did not vest in the Commissioners the property in the sandhills, and that the effect of that section was not to vest in the Commissioners the property in all lands under their "view, cognizance, or management." Lord Abinger's judgment proceeds upon the ground that to construe the section literally would have the effect of depriving a great number of persons of valuable lands and estates which would be transferred to the Commissioners of Sewers without compensation and without any manifest or obvious reason of policy for so doing. Parke B., anxious to avoid the same difficulty, deals historically with the position of Commissioners of Sewers and points out that before the Act the Commissioners were not a corporation and could not hold the lands they bought and had no property in the buildings they constructed or the works they made, and he goes on to say that the Act gives the Commissioners power to buy and hold lands, and not only the Commissioners who buy, but subsequent Commissioners, so that the Commissioners for the time being are to have the lands in the nature of a corporation. He reads the section thus, omitting immaterial words: "The property in all lands which have been or shall be purchased or obtained, and in all buildings and works constructed or made by or by the order of any Commissioners of Sewers, or which (having been so purchased, obtained, constructed, or made) shall be under the view, cognizance, or management of *any* Commissioners of Sewers . . . . shall be vested in the Commissioners of Sewers *for the time being*, under whose view, cognizance, or management the same shall be respectively." It will be noted that this reading takes considerable liberties with the section by inserting material words, namely, "having been so purchased, obtained,

constructed, or made." Moreover, before 1833 the Commissioners were under the disability that they could not sue in trespass in the Courts in respect of damage done to their works or to the sea defences under their control, and one would have thought that one of the objects of the section was to remove this disability not only in respect of lands purchased by them or works executed by them, but also in respect of all sea defences under their jurisdiction, or, in the words of the Act, " under their view, cognizance, or management," and that this object goes far to answer the Chief Baron's objection that the section goes further than the policy of the Act requires.

However, there the decision is, and it would be binding upon me and would dispose of the defendants' contention if it were not for the case of *West Norfolk Farmers' Manure Co.* v. *Archdale* (1), decided by the Court of Appeal in 1886. That was a case relating to an artificial bank of the navigable river Nar in Norfolk. The claim was against the defendants for cutting and destroying the bank, which was alleged to be under the jurisdiction of the Commissioners of Sewers. This allegation was based upon the joint effect of ss. 10 and 47 of the Act of 1833, and the judgment was that before a bank such as is mentioned in s. 10 vests in the Commissioners under s. 47 they must be shown to have exercised some jurisdiction over it. The actual decision in this case does not conflict with the decision in *Stracey* v. *Nelson.* (2) That case was unfortunately not cited to the Court, and Lord Esher M.R. and Lindley and Lopes L.JJ. expressed the view that the bank in question would vest in the Commissioners if they had exercised jurisdiction over it. Lord Esher uses the expression " taken to " it, and says that if the Commissioners' servants had done things with regard to it or had inspected it that would be enough. The defendants naturally rely strongly on this case. They say it is inconsistent with *Stracey* v. *Nelson* (2), that I am bound by it and must follow it. Now, it may be said that, having decided that the bank did not vest in the Commissioners until they had taken to it, the rest of the observations of the Court were obiter. I think, however, that this is scarcely correct, but the general observations of the Court must be read in the light of the subject-matter with which the Court was

(1) 16 Q. B. D. 754. (2) 12 M. & W. 535, 544.

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dealing, namely, an artificial bank, a bank made by somebody; and it seems to me that that fact distinguishes the two cases and may possibly reconcile them. I gather that Parke B.'s reading of s. 47 in *Stracey* v. *Nelson* (1) would not exclude from the Commissioners any artificial work within s. 10 of the Act of 1833 if such artificial work were under the view, cognizance, or management of an existing body of Commissioners. The presumption in such a case would, I presume, be that some earlier Commissioners had executed the work in the absence of evidence to the contrary.

In this state of authorities I have a few points to guide me. First, the point I have to decide was directly before the Court of Exchequer and only indirectly before the Court of Appeal. Second, the law as laid down in *Stracey* v. *Nelson* (1) was, and must have been, known to be the law in 1861 when another Land Drainage Act was passed. It would have been easy to remove the effect of that decision by a section in the Act, but no such section was inserted. I presume, therefore, that *Stracey* v. *Nelson* (1) was accepted as a satisfactory decision by the authorities interested. Third, the Commissioners of Sewers concerned with these sandhills have always adopted the view laid down in *Stracey* v. *Nelson*. (1) They claim property in the sandhills covered by their artificial works and by their buildings and sheds, and no further. Fourth, there is the defendants' Act of 1914—Mablethorpe Urban District Council Act, 1914 (4 & 5 Geo. 5, c. xxi.), s. 4 of which is as follows:—Sub-s. 1: "The lands described in the schedule to this Act and shown on the deposited plans and described in the deposited book of reference and locally known as sandhills or dunes (and in this Act referred to as 'the sandhills') shall be and the same are (subject to the jurisdiction powers and rights of the Commissioners thereover or therein and to the provisions of this Act) hereby declared to be and shall accordingly be vested in the council freed and discharged from all rights and interests therein (if any) other than as aforesaid." Sub-s. 2: "The sandhills shall within the meaning of section 68 of the Lands Clauses Consolidation Act 1845 and for the purposes of that Act be deemed to be lands taken for the undertaking or works for which the promoters of the undertaking shall not have made satisfaction and such of the provisions of the said Act with respect

(1) 12 M. & W. 535.

to the purchase and taking of lands otherwise than by agreement as relate to lands taken as aforesaid shall apply accordingly as fully as if within the meaning of the said Act this Act were the special Act and the sandhills were lands authorised to be taken for the undertaking or works by the special Act authorised and the council were the promoters of the undertaking and any person owning the sandhills or any part thereof or having any interest therein at the passing of this Act shall be entitled to compensation accordingly: Provided that within six months after the passing of this Act he shall have given notice in writing to the council of the nature of the lands and of the interest in respect of which he claims compensation and the amount of compensation so claimed but this proviso shall not operate unless the council shall within one month of the passing of this Act give public notice of the effect of the provisions contained in this section by advertisement in the Times newspaper and the Louth and North Lincolnshire Advertiser, or some other newspaper circulating in the district." Sect. 7, sub-s. 3, reads thus: "Nothing in this Act contained shall be deemed or construed to extend to prejudice diminish alter abridge or take away any of the jurisdictions rights powers or authorities vested in the Commissioners and except as in this section is otherwise provided all such jurisdictions rights powers and authorities shall be as good valid and effectual to all intents and purposes as if this Act had not been passed." Now, it is clear that this Act proceeds upon the assumption that the property in these sandhills is not vested in the Commissioners. It vests the property in the defendants subject to the jurisdiction, powers, and rights of the Commissioners, and it would be absurd to say that the Act vests the property in the sandhills in the defendants while retaining the property in the Commissioners. In short, the Legislature, like the Commissioners, proceeds upon the view taken of s. 47 of the Act of 1833 by the Court of Exchequer in *Stracey* v. *Nelson.* (1)

Under these circumstances I do not think I ought to be wiser than the Legislature, or more jealous of their rights than the Commissioners themselves, and I must follow the decision of the Court of Exchequer and hold that the property in these sandhills is not vested in the Commissioners of Sewers. I am glad to think that in so holding

(1) 12 M. & W. 535.

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I am in accord with the view uniformly taken of the position by the defendants themselves.

I proceed to consider the next objection raised to the plaintiffs' title. The conveyance to them contains no mention of the sandhills and the parcels as described in that conveyance are obviously confined to the four and a half acres of inlands. The defendants contend that when once sandhills such as these have accrued to the owner of the adjoining inlands the title remains in him and does not pass to his vendee except by express grant, or possibly by prescription. I will deal first with the need for an express grant. In dealing with this point it must be remembered that as the conveyance is in 1885 and the vendor conveys as beneficial owner, the general words of the Conveyancing Act, 1881, have to be read into the deed. These words do not appear to me to help the plaintiffs; land is not appurtenant to land except in such cases as highways or beds of rivers. It is true that Mr. Callis in his Lectures likens land gradually left by the sea to a highway, but he does so merely by way of illustrating the rights enjoyed over such lands by persons other than the owner, and no authority was cited to me to show that for the purpose of passing title from one owner to another sandhills stand on the same footing as highways. It would be extremely convenient if such was the case and if the common law doctrine was that such lands belong to the owner of the adjoining inlands for the time being. The contrary doctrine might lead to many difficulties and even absurdities, but it is, I think, tolerably clear that title to such lands may be acquired by prescription: see *Lowe* v. *Govett*. (1) Now, once it is admitted that the title to such lands may be acquired by prescription adversely to the owner of the adjoining inlands, the argument ab inconvenienti loses much of its force. Moreover, the case in the Court of Appeal of *Mellor* v. *Walmesley* (2) appears to proceed upon the assumption that a grant of adjoining inlands so described as not to include an accretion of land between the lands granted and the shore does not operate to pass such accretion. I come to the conclusion that as the plaintiffs have no grant of these sandhills claimed by them they must rely, if they are to succeed, upon prescription, and I now pass on to consider the case upon that head.

(1) (1832) 3 B. & Ad. 863. (2) [1905] 2 Ch. 164.

Now, the Commissioners being got rid of, and the question being one between the plaintiffs and some possible former owner who makes no claim, I am prepared to hold that the owner of adjoining inlands acquires a title to such lands as are here in question by prescription if he can prove the exercise of even slight acts of ownership over such lands for the necessary period, and in my judgment the plaintiffs in this case by the acts upon which they rely, and to which I need not again refer in detail, have acquired a prescriptive title. Nor, as in my view the sandhills are not vested in the Commissioners of Sewers, do I consider that the plaintiffs have the less acquired such title because the Commissioners have refused to allow permanent structures to be erected upon the sandhills by the plaintiffs or their lessees without licence. The insistence by the Commissioners upon nothing being built upon the sandhills without their licence is on this view merely a precaution taken by them in order that they might at all times be able to perform their public duty of maintenance and repair and of doing anything necessary upon the sandhills to prevent danger of inroads by the sea. The plaintiffs have in effect such rights as owners have, subject only to the jurisdiction of the Commissioners.

The conclusion at which I have so far arrived is in the plaintiffs' favour ; but they made a further point, and, as I heard the argument upon it, I had better deal with it. This last point was estoppel. The defendants, they say, were at the passing of the Act of 1914 their undertenants of a small piece of these sandhills, and they cannot deny the plaintiffs' title. I will assume that the tenancy of a few yards of ground estops a tenant from denying his landlord's title to the surrounding acres held under the same title or claim of title, but I think the doctrine of estoppel which operates between landlord and tenant has no application to the same parties even while the tenancy exists when the question of title arises between them, not in this relationship of landlord and tenant, but of vendor and purchaser. I think the estoppel point fails.

I have so far dealt with the plaintiffs' claim to the whole of the sandhills numbered 9 on the plan except the sandhills adjoining the last 77 yards. The plaintiffs' title to this parcel is derived from a conveyance from one Robert Ranshaw dated April 4, 1901. The

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land is described as a piece of arable land having a frontage of 77 yards to the Furlong Road containing one rood or thereabouts, being the southernmost portion of a large piece of land belonging to Henry Humberstone Gray. Now it appears that Mr. Gray occupied a long, narrow piece of land of something over an acre in extent for which he or his predecessors had since 1807 paid a rent of 10*s.* a year to the dyke-reeve of Theddlethorpe, and such rent is still being paid by his sons in respect of the same piece of ground to this day. Mr. Ranshaw bought of Mr. Gray the piece of ground part of the land so occupied by Gray and sold it to the plaintiffs' predecessor as stated. Mr. Gray never was the owner, but always the tenant; he had no right to sell to Ranshaw. Ten shillings a year is still paid to the dyke-reeve in respect of the whole of Gray's holding, and as between Mr. Ranshaw and the dyke-reeve Mr. Ranshaw has no better title than Gray and could convey no better title to the plaintiffs. Mr. Ranshaw laid out a portion of the adjoining sandhills as a site for a volunteer battery, and it was for some time so used; but this does not help the matter, because if he thereby acquired a prescriptive title to any portion of the sandhills he acquired it for the owner of the inlands, whose tenant he, through Gray, was. It is not clear what title the dyke-reeve originally had to this ground of Gray's. At one time he collected rents from several other persons who had gardens adjoining Gray's. They, however, ceased to pay while Gray continued. These gardens all, I gather, came into existence in connection with the making of the new cut, and the connecting of Theddlethorpe with the new cut, in or shortly after the year 1802 to which I have referred, but what authority the dyke-reeve had to collect the rent for the Commissioners of Sewers I do not know. If Gray had ceased to pay, as did the occupiers of similar pieces of ground, it is possible the rent could not have been enforced. Since 1833 it appears to me that there was a possibility of title in the Commissioners; I must at any rate at this distance of time so assume, and the plaintiffs' claim to this portion of the sandhills fails.

This is an action to enforce an award. The arbitrator has awarded one sum in respect of the whole area of No. 9 on the plan. The plaintiffs have succeeded as to all but a length of 77 yards, but as I have no materials for dividing or apportioning the sum awarded I

cannot enforce the award in whole or in part, and I regret that for this reason the action fails.

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Judgment for defendants.

Solicitors for plaintiffs: *Richard Brooks, for Haddon, Owen & Son, Louth.*

Solicitors for defendants: *Arthur Taylor & Co., for Sharpley & Son, Louth.*

J. S. H.

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June 6, 19.

Landlord and Tenant—Covenant by Lessee for Self and Assigns not to sub-let without Lessor's Consent—Sub-lease—Further Sub-lease by Sub-lessee without consent—Liability of Lessee.

Where a lessee, who has covenanted for himself and his assigns that he will not sub-let or part with possession of the premises without the consent of the lessor, sub-lets them, the lessor cannot, if the sub-lessee further sub-lets without his consent, complain of such further sub-letting as a breach of covenant by the lessee. A sub-lessee is not for that purpose an assign.

C. let premises to W., who covenanted for himself and his assigns that he would not sub-let or part with possession without the consent of C. W. sub-let the premises to B., who similarly covenanted not to sub-let or part with possession without the consent of W. B. sub-let to F. with the consent of W. but without the consent of C.:—

Held, that the fact of W. consenting to the sub-lease to F., and thereby allowing F. to take possession of the premises, did not amount to a parting with the possession by W. or his assign so as to constitute a breach of his covenant not to part with the possession without C.'s consent.

TRIAL of counter-claim in an action before Atkin J.

The plaintiff's claim, which was for rent, was remitted to a county court and there disposed of. The facts relating to the counter-claim were as follows:—On January 22, 1901, one Whitehead demised to the defendant, M. W. Carmichael, the first, second, and third floors of No. 46, Dover Street for a term of twenty and a half years less three days from December 25, 1900. Carmichael took the lease for the purpose of carrying on his business as a manicurist. That business was large and respectable, and he

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numbered among his customers persons of good position and character. On July 4, 1901, the defendant, Carmichael, re-demised the second and third floors to his own landlord, Whitehead, for the remainder of the term granted by the demise of January 22, 1901. The lease, which provided that the expressions "lessor" and "lessee" therein should include their respective "assigns," contained a covenant by the lessee, Whitehead, that he would not "assign underlet or otherwise part with the possession of this present indenture of lease on the premises hereby demised or any part thereof without the license in writing of the lessor for that purpose on every occasion first had and obtained which license shall be strictly construed and shall extend only to the assignment or underlease for which the same shall be granted and shall be confined to the particular person therein named and shall not be considered as a waiver of the present covenant so as to permit the person therein named to assign or underlet afterwards at pleasure without procuring a similar license on every future occasion but the lessor hereby covenants with the lessee that such license shall in no case be arbitrarily withheld in the case of a respectable and responsible person."

On January 15, 1907, Whitehead sub-demised the second and third floors to one Benjamin for the remainder of the term less seven days. That sub-lease contained covenants by the sub-lessee on behalf of himself and his assigns that he would not use the premises for any other purpose than that of a private dwelling, and would not assign, sub-let, or part with the possession without the consent in writing of the sub-lessor. At some date after January, 1907, the plaintiff Mackusick acquired from Whitehead his interest in the premises, that is to say, both the reversion expectant on the determination of the lease of January, 1901, to Carmichael and also the term in the second and third floors created by the redemise of July, 1901. At some date which did not appear Benjamin assigned his term created by the sub-demise of January, 1907, and in 1913 that term was vested by assignment in a Mrs. Barron, who occupied the premises for the purpose of a bridge club. In October, 1915, Mrs. Barron desired to sub-let to a Mrs. FitzHenry, and application was made by Mrs. Barron's solicitors to Mackusick for a licence so to sub-let. It was stated that Mrs. FitzHenry was taking the

premises for her private residence. Mackusick's solicitors asked for and obtained two references, with which, in the opinion of the judge, they were justified in being satisfied, and on November 8, 1915, a licence was granted by Mackusick for the transfer of the sub-demised term by Mrs. Barron to Mrs. FitzHenry. Carmichael was not consulted about this sub-letting, and was not asked for and did not give any licence. Mrs. FitzHenry took possession of the premises in November. In March, 1916, Carmichael had reason to suspect the use to which the second and third floors were being put, and eventually he obtained evidence that the premises were being used as a brothel. He accordingly took proceedings to restrain the occupant from continuing so to use the premises, and in due course he obtained an injunction, whereupon Mrs. FitzHenry vacated the premises. The costs and expenses reasonably incurred by Carmichael in getting rid of the nuisance amounted, as the judge found, to 130*l.* Being of opinion that Mackusick was responsible to him for the loss so incurred, Carmichael withheld the quarter's rent due in June, 1916. For that rent the present action was brought. The defendant by his counter-claim sought, amongst other relief, to recover the amount of the said costs as damages for breach by the plaintiff of his assignor's covenant not to underlet or part with possession of the premises without the defendant's consent.

Coldridge, K.C., and *W. F. Swords*, for the defendant. The reversion expectant on the determination of the sub-lease to Benjamin being vested in the plaintiff he is liable on the covenant not to assign in the lease of July, 1901. By licensing the sub-lease to Mrs. FitzHenry and causing her to be put into possession he "parted with the possession" within the meaning of the covenant, and, having done so without the defendant's consent, he committed a breach of the covenant. To hold otherwise would render the covenant illusory; for when once the lessor had granted his licence for a sub-lease he would be powerless to prevent further sub-letting by the sub-lessee, however objectionable the proposed sub-tenant might be. Then if the plaintiff's licence operated as a breach of the covenant, the defendant is entitled to recover the amount of his costs incurred in getting rid of the person so put in possession

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as naturally resulting from the breach. In *Lepla* v. *Rogers* (1) a lessee, who had covenanted not to sub-let without licence, sub-let the premises without the lessor's consent to a person who, as he knew, intended to use them as a turpentine distillery. The premises having been burnt down by a fire arising from their being so used, it was held that the loss was the natural result of the breach of covenant and was recoverable as damages.

Disturnal, K.C., and *Kenneth Chalmers*, for the plaintiff. The licence to sub-let granted to Mrs. Barron was no breach of the covenant. He could not at the date of the licence part with the possession, for it had been parted with long before by the sub-lease to Benjamin. Even if the licence was a breach of the covenant, the costs that the defendant incurred in obtaining the injunction are not the natural consequence of that breach and are not recoverable.

Cur. adv. vult.

June 19. ATKIN J., after stating the facts as above set out, proceeded as follows :—The substantial claim that was pressed was for damages for breach of the covenant not to part with possession. It was said that Mrs. FitzHenry could not have obtained possession without the consent of the plaintiff: he gave such consent; he therefore must be taken to have given possession to the proposed sub-tenant. I think that this argument is fallacious. Treating the plaintiff as in the same position as Whitehead, I think that the covenant which is made by the lessee and his assigns does not make the lessee liable for an act done by a sub-tenant. For the purposes of this covenant under ordinary circumstances a sub-tenant is not an assign: *Wilson* v. *Twamley* (2), per Romer L.J.; nor is he an agent of the lessee. (2) Nor can I construe the covenant as a covenant that a sub-tenant or assign to whom a licence is granted shall not assign without a licence of the original lessor. The words of the covenant are limited to the effect to be given to the licence—they confine the licence to the covenant. They do not extend the covenant beyond an obligation upon the lessee and his assigns not to assign, underlet, or part with possession. In this respect I desire to refer to the judgment of James L.J. in *Williamson* v.

(1) [1893] 1 Q. B. 31. (2) [1904] 2 K. B. 99.

Williamson. (1) In that case a lease of certain mines contained a covenant by the lessee not to assign or underlet without licence. The lessor, Lord Sidmouth, had granted a licence to underlet certain parts of the property, but the licence provided that this should not authorize any further sub-letting or parting with the possession of the part of the mines the subject of the licence without such consent as was required by the lease. The lessee then agreed to sub-let to an underlessee the part of the mines the subject of the licence, the underlease to contain provisions in all respects like those in the original lease. James L.J., in giving judgment, said: "The Vice-Chancellor appears to me to have fallen into an error in considering that Lord Sidmouth, after he has once granted a license, has anything whatever to do with this underlease. It is very true this underlease could not have been made without Lord Sidmouth's consent; but Lord Sidmouth did give his consent in writing to the granting of the underlease, adding that the license was not to authorize any further dealings; that is to say, that nobody could rely on the license as authorizing anything else to be done with the property. That of course leaves the parties entirely on their rights, independently of that license. It is said that the words of the license meant that the underlessee was not to deal with the property without Lord Sidmouth's further license. There are no such words in the license, and there is nothing to my mind from which any such meaning can be extracted from the license. It says simply this, 'I have granted that license to do something, it shall not authorize you to do anything else.' But, independently of that license, how does the matter stand with regard to the underlessee? I am clearly of opinion that the underlessee is in no way bound by the original stipulations as to assignment in the lease. The words are, that the lessee, his executors, administrators, or assigns (the words lessee or lessees imply executors, administrators, or assigns), shall not do a certain thing. Beyond all question, that is a bargain between the lessor and the lessee, and does not extend to anything affecting the estate of the underlessee, between whom and the original lessor there is no privity whatever. There is no privity of contract and no right. That being so, Lord Sidmouth has nothing whatever to do, as it seems to me, with the underlessee, and nothing.

(1) (1874) L. R. 9 Ch. 729, 732, 733.

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therefore, it appears to me, can be imported into the consideration of this question arising from any supposed necessity of protecting Lord Sidmouth's interests or making the agreement as if it were a tripartite agreement between the lessor and the lessee and Lord Sidmouth. I can see no ground for introducing Lord Sidmouth into the transaction after he has once granted the license and that license has authorized that which is proposed to be done."

In truth neither Mr. Mackusick nor any assign of his had possession of the premises in November, 1915. I do not think, therefore, that Mr. Mackusick or any assign of his can be said to have " parted with " possession. I think, therefore, that the defendant fails to prove a breach of covenant by the plaintiff. It was said, not for the first time in such cases, that such a construction makes of little avail a covenant not to underlet without licence, inasmuch as the first undertenant licensed is free from the control of the superior landlord. Such a consideration cannot affect the plain meaning to be put upon the covenant, but means exist by which by proper expedients the control of the superior landlord can be retained. As an illustration I would refer to the note to *Williamson* v. *Williamson* in Mr. Foa's valuable book, 5th ed., p. 267.

It was argued on behalf of the plaintiff that in any case the costs incurred by Mr. Carmichael as above mentioned could not be recovered as damages for breach of the covenant not to assign. So far as it is a question of fact, it may be desirable to state that in my judgment the action taken by Mr. Carmichael was natural and reasonable. In the circumstances known to all parties at all material times parting with possession of the second and third floors to a person not respectable was likely to cause damage to the person carrying on his business on the first floor, and such a consequence of a breach would be well within the contemplation of the parties. I agree with Hawkins J. in *Lepla* v. *Rogers* (1) that the object of this covenant is to protect the landlord from his premises being occupied by an objectionable tenant, whether the tenant be insolvent, or carrying on a dangerous business as in *Lepla* v. *Rogers* (1), or an immoral business. I have no doubt that at the time possession was parted with the proposed tenant was not a respectable tenant, though the plaintiff had no knowledge of that fact, and had the plaintiff

(1) [1893] 1 Q. B. 31, 36.

been responsible for possession being given to her I think that the damages incurred by the defendant would have been the natural and reasonable consequence of the breach. But for the reason I have given in this case the plaintiff has not committed a breach of covenant, and there must therefore be judgment for him on the counter-claim with costs.

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MACKUSICK v. CARMICHAEL.

Atkin J.

Judgment for the plaintiff.

Solicitors for defendant: *Taunton & Co.*
Solicitors for plaintiff: *Last, Sons & Fitton.*

J. F. C.

CONTINHO CARO & CO. *v.* VERMONT & CO.

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June 7, 22.

Emergency Legislation—Enemy Firm—Order of Board of Trade to wind up Business—Controller—Power of, to sue for Debts in Name of Firm—Trading with the Enemy (Amendment) Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-s.* 2.

Where under s. 1 of the Trading with the Enemy (Amendment) Act, 1916, the Board of Trade makes an order requiring that the business carried on in the United Kingdom by a firm of enemy nationality shall be wound up, and appointing a controller, the Board may by that order confer on the controller power to sue in the name and on behalf of the firm for debts which became due before the outbreak of war, without being liable to be met by the defence that the plaintiffs are an enemy firm.

TRIAL of action before Atkin J.

The plaintiffs were a German firm carrying on business at Hamburg, and also in the United Kingdom through a branch. In July, 1914, the defendants were indebted to the plaintiffs for the price of certain tinplates sold to them by the plaintiffs. By an order dated May 8, 1916, and made in pursuance of s. 1 of the Trading with the Enemy (Amendment) Act, 1916 (1), the Board of Trade

(1) By s. 1, sub-s. 1, of the Trading with the Enemy (Amendment) Act, 1916, "Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm, or company is, by reason of the enemy nationality or enemy association of that person, firm, or company . . . . carried

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required that the business of the plaintiff firm should be wound up. The Board thereby appointed a Mr. Wild as controller to conduct the winding up, and they authorized him (inter alia) "to get in and collect all monies owing to or held for or on behalf of the said firm and to sell the real and personal property and things in action of the said firm by public auction or private contract," and "to bring or defend any action or other legal proceedings in the name and on behalf of the said firm." The order did not vest the property of the plaintiff firm in the controller. In June, 1916, the controller, in pursuance of that order, brought this action in the name and on behalf of the plaintiff firm to recover the price of the goods.

Sir Gordon Hewart, S.-G., Austen-Cartmell, and *H. Maddocks*, for the plaintiffs.

Compston, K.C., and *J. H. Watts*, for the defendants. The general rule with respect to an action by alien enemies is that a suit cannot be maintained during the continuance of war either by the enemy plaintiff himself or by any person on his behalf. The "alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's Courts is suspended during the progress of hostilities and until after peace is restored": per Lord Reading C.J., *Porter* v. *Freudenberg*. (1) The question is whether the Trading with the Enemy (Amendment) Act, 1916, has authorized

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on wholly or mainly for the benefit of or under the control of enemy subjects, the Board of Trade shall, unless for any special reason it appears to them inexpedient to do so, make an order" as one of two alternatives "(*b*) requiring the business to be wound up.'

Sub-s. 2: "Where the Board of Trade make any such order they may . . . . appoint a controller to control and supervise the carrying out of the order and, if the case requires, to conduct the winding up of the business, and in any case where it appears expedient to the Board of Trade, the Board may, as occasion requires, confer on the controller such powers as are exercisable by a liquidator in a voluntary winding up of a company (including power in the name of the person, firm, or company, or in his own name . . . . to convey or transfer any property, and power to apply to the High Court or a judge thereof to determine any question arising in the carrying out of the order), or those powers subject to such modifications restrictions or extensions as the Board think necessary or convenient for the purpose of giving full effect to the order."

(1) [1915] 1 K. B. 857, 880.

the Board of Trade to confer on the controller a right to sue on the enemy's behalf on better terms than those on which an agent of the enemy could have sued at common law. It is not disputed that under the words "subject to such modifications . . . . or extensions as the Board think necessary" the Board might have vested the firm's property in the controller and thereby empowered him to sue in his own name. But they have not done so. They have conferred on him nothing more than the power of a liquidator, and a liquidator can sue only as the agent of the company. He is therefore liable to be met by the defence that the plaintiffs are an enemy firm; or in other words, in respect of this particular debt he cannot sue. This construction of sub-s. 2 does not have the effect of rendering it wholly inoperative. That sub-section is abundantly satisfied by supposing it to refer to debts in respect of which an enemy firm might sue notwithstanding its enemy character, as for instance where such an action is authorized by clause 6 of the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, which provides that "Where an enemy has a branch locally situated in British . . . . territory . . . . transactions by or with such branch shall not be treated as transactions by or with an enemy." That clause, however, does not apply to debts contracted before the outbreak of war: *Wolf & Sons* v. *Carr, Parker & Co.* (1); and here the debt sued for was so contracted.

Sir Gordon Hewart, S.-G., in reply. The intention of the Act is to enable the controller to sue effectively in the name of the enemy firm. Sub-s. 2 does not confine him to the remedies of a liquidator. The words "subject to such modifications . . . . or extensions as the Board think necessary," which it is admitted would allow of an authority to the controller to sue in his own name, must equally allow of an authority to sue in the name of the firm. The effect of the defendants' construction is to render the sub-section practically nugatory.

Cur. adv. vult.

June 22. ATKIN J. read the following judgment:—This action was brought to recover the price of goods (tinplates) sold and delivered to the defendants upon the outbreak of war. I assume that the price

(1) [1915] W. N. 195.

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became due before August 4, 1914. It is admitted that the members of the plaintiff firm are alien enemies carrying on business at Hamburg. It was further admitted that the plaintiffs carried on business in the United Kingdom through a branch in the United Kingdom, whatever the meaning of "a branch" may be. Under these circumstances, if nothing further had to be considered, it is plain that the plaintiffs, as alien enemies, would not be entitled to sue: see *Wolf & Sons* v. *Carr, Parker & Co.* (1) But on May 8, 1916, an order was made by the Board of Trade under s. 1, sub-s. 1, of the Trading with the Enemy (Amendment) Act, 1916, that the business of the plaintiff firm be wound up. By the order Mr. Norman Ward Wild was appointed controller to conduct the winding up, and he was given powers, inter alia, to get in all moneys owing to the firm and to bring any action in the name and on behalf of the firm. This action is brought by the controller in pursuance of such powers. The defence raises the important question whether when an action is brought under those circumstances the plaintiff has larger rights of suit than he would have if no order had been made. It is said on behalf of the defendants that while the controller may bring an action in the name of the firm he is liable to be met with all the defences to which the plaintiff firm would be subject had no order been made. No rights of property, it is said, are vested by the Act or the order in the controller; he is no more than a liquidator; and had this been an enemy company and the controller a liquidator appointed in the winding up an action in the company's name could not be maintained.

It is necessary to consider with some care the effect of the provisions of the Trading with the Enemy (Amendment) Act, 1916. The Act came into force on January 27, 1916. That date is after the decision of the Court of Appeal in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2), on January 19, 1915, and before the decision of the House of Lords in the same case on June 30, 1916. (3) That case decided that where the business of a limited company registered in the United Kingdom was conducted under the control of enemy subjects resident in enemy country the company might possess enemy character so as to be incapable of legal commercial inter-

(1) [1915] W. N. 195. (2) [1915] 1 K. B. 893.
(3) [1916] 2 A. C. 307.

course with British subjects, or of bringing action in this country. I think it probable that the Act contemplated in the main the winding up of businesses carried on in this country by persons who were not of enemy character so as to be under legal disabilities. But it appears plain that the words of the Act are not limited to such businesses, and I think it must be taken that the power given by the Act extends to the winding up of businesses carried on in this country by enemies, whether by general or special licence or otherwise. But, whether the businesses are carried on by enemies or not, it seems to me that the Legislature intended the same treatment to be meted out to them. They are to be wound up, the assets realized, and applied inter alia in discharging debts due to non-enemy creditors in priority to debts due to enemy creditors. To use an expression of my brother Younger, "the plague spot is to be eradicated." To carry out this purpose it seems to be essential that the controller should have powers to sue for debts. If no such powers existed the debts would be uncollected, the creditors would be unpaid, the winding up would be incomplete, and the business would "Like a wounded snake drag its slow length along." Such results would, I think, defeat the object of the Act.

I see no reason why the Legislature should not have given powers to sue for the purposes of the Act. It must be conceded that in the case of enemy businesses the power to wind up a business, apart from the right to sue, involves the right to enter into commercial transactions with the company through the controller, which otherwise would be prohibited as trading with the enemy. Would the right to sell the assets of the business (essential if the business is to be wound up) include the right to sell the debts? May the controller assign the debts to an assignee who can sue in his own name, and yet is the Act not to be construed so as to enable the controller to sue in the company's name. It has to be remembered that the disability to sue, like the disability to enter into commercial intercourse, is intended for the disadvantage of the enemy; and as commercial intercourse can be rendered lawful by the licence of the executive authority, so I think can the right of suit be licensed, at any rate indirectly. In the case of *The Hoop* (1) Lord Stowell says: "Another principle of law, of a less politic

(1) (1799) 1 C. Rob. 196, 200.

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nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a persona standi in judicio. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our courts of the law of nations; they are so far *British* courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that pro hac vice discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice: But otherwise he is totally exlex." In this regard I would refer to the form of plea of "Alien Enemy" which is to be found in the 3rd edition of Bullen and Leake at p. 475, where the plea is in this form: "That at the commencement of this suit the plaintiff was and is an alien born (that is to say) born in the empire of —— of alien father and alien mother, and was not nor is a subject of our lady the Queen by naturalization, denization or otherwise, and was and is an enemy of our lady the Queen, and residing in this kingdom without the licence, safe-conduct, or permission of our said lady the Queen." There seems no reason why one should suppose that the Legislature should refrain from licensing suits in the name of enemies where the right of suit is necessary to carry out an object conceived by them to be for the national advantage. I am further assisted to the conclusion that it is reasonable to infer such an intention when I remember that by s. 4 of the Trading with the Enemy (Amendment) Act, 1914, on the application of a creditor the Legislature had authorized the High Court to make an order vesting any personal property belonging to an enemy in the custodian appointed by that Act, and that by s. 4, sub-s. 1, of the present Act the Board of Trade have power by order to vest in the custodian any personal property belonging to an enemy. If, as I assume, such orders extend to choses in action with the right to reduce them into possession, I see no logical reason

why the Legislature should not have invested the controller with similar powers of suit.

For these reasons I think that the Act authorizes the Board of Trade in such a case as the present to clothe the controller with a power to sue in the name of an enemy. I have no doubt that the order of the Board of Trade of May 8, 1916, in fact gave such powers to the controller. I think, therefore, that the objection to this action fails and that judgment should be given for the plaintiffs.

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Atkin J.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Hurd, Crook & Jones.*
Solicitors for defendants: *Rollit, Sons & Compston.*

J. F. C.

OWNERS OF S.S. PLATA *v.* FORD & CO.

1917

June 19.

Charterparty—Demurrage—When Time begins to run—Arrival of Ship in or off Port of Destination—Uselessness of Arrival—Whether an Excuse for Non-arrival.

A charterparty provided that the ship should discharge her cargo at a certain rate, "time to count twenty-four hours after arrival in or off port of destination whether berth available or not." The ship was ordered to Havre. In the course of the voyage she received orders from the French Admiralty to go to Cherbourg and there await her turn for a discharging berth at Havre. Notice was given that if she disobeyed those orders and went to Havre she would on arrival there be at once sent back to Cherbourg, a distance of seventy-five miles, to await her turn. She obeyed the orders and put in to Cherbourg, and remained there for several days until she received permission from the French authorities to proceed:—

Held, that the fact that she would have been ordered back if she had gone to Havre, and that her going there would consequently have been useless, did not make her arrival at Havre any the less a condition precedent to the lay days beginning to run, and that her time did not count while she was lying at Cherbourg waiting her turn.

AWARD stated by an arbitrator in the form of a special case in a dispute arising out of a charterparty.

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1. By a charterparty dated May 10, 1916, made between the owners of the steamship *Plata* and Messrs. Ford & Co., charterers, it was agreed that the steamer having loaded a cargo at Buenos Ayres should proceed therewith to discharge at a safe port on the French Atlantic coast between Bordeaux and Havre (both included), Rouen excluded, or as near thereunto as the vessel could safely get, always afloat, and should there deliver the cargo in accordance with clause 41 on being paid freight as mentioned in the said charterparty. Clause 41 of the charterparty was as follows: "Cargo to be discharged at the minimum average rate of 300 tons per running day, Sundays and holidays excepted, time to count twenty-four hours after arrival in or off port of destination whether berth available or not, any custom of the port to the contrary notwithstanding, and to be absolutely free of turn, should steamer be longer detained demurrage to be paid at the rate of 100*l.* per day."

2. The steamer duly loaded a cargo, and was ordered to discharge at Havre. The vessel on arriving at St. Vincent on her way to Havre was directed by the French naval authorities to proceed to Cherbourg and there wait her turn for a discharging berth at the port of Havre. These orders were given in pursuance of a notice issued by the French naval authorities, dated Paris, March 28, 1916, under which vessels bound for Havre should be obliged to receive orders from their shipowners or consignees or from the maritime authorities at the last port reached to touch at Cherbourg for those coming from the west and from French ports, and at Spithead for those coming from the east and from the ports of Great Britain and Ireland. The notice stated that ships which had knowingly infringed the orders given, to try to get a turn to enter, should be immediately sent back to Cherbourg in order to wait.

3. In normal times deep-water vessels bound for Havre, if they cannot enter at once, anchor off the port in Havre Roads, and if there is not a berth available await there their turn for a discharging berth. The expression "turn" means the sequence in which vessels awaiting a discharging berth are entitled to have a berth allotted to them.

4. The said order of March 28 was made in consequence of the recrudescence of submarine action. A number of vessels which had been waiting in Havre Roads had been torpedoed whilst so lying there.

5. The *Plata*, in accordance with her instructions, proceeded from St. Vincent to Cherbourg and arrived there on July 1 at 7 A.M. and remained there at anchor until 7 A.M. on July 12, when, a berth having become vacant for her in the port of Havre, she was allowed to proceed from Cherbourg to Havre, where she duly arrived and berthed on July 12 at 8.45 P.M. The distance from Cherbourg to Havre Roads is about seventy-five miles.

6. The discharge of the cargo was duly proceeded with at Havre and finished on July 20 at 10 A.M.

7. The owners contended that under clause 41 the arrival of the steamer at Cherbourg must be deemed to be an arrival off the port of Havre, and that she was awaiting there a "turn" within the meaning of the clause, and that then the time for discharging would commence to count twenty-four hours after arrival at Cherbourg.

8. The charterers contended that an arrival at Cherbourg could not be construed as an arrival in or off the port of Havre, and therefore the lay days did not count until the steamer had actually arrived in the port of Havre, and that on that footing no demurrage was due.

The arbitrator, if and so far as it was a question of fact for him to decide, found that the vessel on arrival at Cherbourg had arrived off the port of Havre within the meaning of clause 41 and that her time began to run twenty-four hours after such arrival. He further found that she was detained there waiting a turn, and if time so occupied was not to be counted she would not be "absolutely free of turn" as provided in the charterparty. If the owners' contention was right in law, he held that they were entitled to seven days' demurrage, but if the charterers' contention was right, no demurrage was payable.

Roche, K.C., and *Le Quesne*, for the charterers. It is a condition precedent to the lay days beginning to run that the ship should be an arrived ship. By the terms of the charterparty she was bound to arrive in or off the port of Havre. She only proceeded as far as Cherbourg, and, having regard to the distance between that port and Havre, Cherbourg cannot be said to be off the latter port. If the ship had been coming from the east she would, under the orders of the French Admiralty, have had to stop at Spithead, and no one

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would contend that Spithead was off the port of Havre. The ship's time did not begin to run until twenty-four hours after she had actually arrived at Havre.

Inskip, K.C., and *A. Neilson*, for the owners. No doubt as a general rule a ship must arrive before her time can begin to run; but under special circumstances actual arrival may be excused. If the ship in defiance of the French Admiralty's orders had persisted in going to Havre she would have been an arrived ship, and time would have begun to run twenty-four hours after her arrival, notwithstanding that she would have been immediately sent back, so that the charterers would have derived no benefit from her going there. If there had been no Admiralty prohibition against her going to Havre, the fact that she would have had to wait several days before her turn was reached would not have prevented time from counting; for the charterparty expressly says so—"Whether berth available or not . . . . and to be absolutely free of turn." The Admiralty prohibition did not alter the position of the parties. As it could make no difference to the charterers whether she waited her turn in Havre Roads or in Cherbourg, she must under the circumstances be treated as being in the same position when she put into Cherbourg as if she had actually completed her voyage. The law does not require the performance of a condition if the circumstances are such that performance can serve no useful purpose nor confer any benefit on the party in whose interest the condition was imposed.

BAILHACHE J. This is an award stated in the form of a special case, and the question to be decided is as to the construction to be put, having regard to the facts of the case, upon clause 41 of the charterparty made between the parties dated May 10, 1916. Under that charterparty the steamer *Plata* was to load a cargo at Buenos Ayres and proceed with it to the French coast ports between Bordeaux and Havre, both ports included. The steamer was loaded and Havre was nominated as her port of destination. In the course of her voyage she called at St. Vincent and there received orders from the French authorities to proceed to Cherbourg to await her turn for entering Havre. The vessel arrived at Cherbourg and was detained there for some days awaiting her turn. The arbitrator

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has found that she was waiting her turn there on demurrage, and he found what was the amount due from the charterers to the shipowners in that point of view. The question for me to determine is whether she was in fact on demurrage or not while waiting at Cherbourg. That depends entirely on the construction to be placed on clause 41 of the charterparty, which says "Cargo to be discharged at the minimum average rate of 300 tons per running day . . . . time to count twenty-four hours after arrival in or off port of destination." It is quite clear that on the face of the clause the owners were stipulating that twenty-four hours after the vessel arrived at Havre her time was to count; and the question is whether the time is to be counted just the same although the vessel did not arrive in or off the port of Havre, but arrived at Cherbourg and was detained there while a berth was being secured at Havre. The general principle applicable to all these cases is very well known, and it is this: It is the duty of the vessel to arrive at the place of destination, whether that place is a port, a roadstead, a dock, or a berth. It is the duty of the charterer to be ready for that vessel when she arrives, and to proceed to discharge her if she is ready in accordance with the terms of the charterparty. But, speaking generally, the vessel must first of all arrive. Any obstacle that prevents the vessel arriving is for the vessel's account, and not for the charterer's account. The delay so occasioned must be borne by the shipowner and not by the charterer. That is equally true whether the obstacle is a physical obstacle or a legal obstacle, or a restraint of princes. In this case the vessel loyally obeyed the orders of the French Admiralty, arrived at Cherbourg and waited there. Cherbourg is seventy-five miles from Havre. By the terms of the charterparty time is to count twenty-four hours after arrival in or off the port of destination. The ship being at Cherbourg had not arrived in or off her port of destination. Cherbourg is not Havre. The obligation of the charterers to discharge never attached at Cherbourg. The arbitrator has taken what is not at all an unreasonable business view. He said it does not matter whether she was in Havre or Cherbourg; she could not have been discharged in any case, as she was only detained awaiting her turn. But it does matter, and the reason why it does so is that the contract says she is to arrive at Havre, and, as I have already said, it is the

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obligation of the vessel to arrive. The charterer has nothing to do with her arrival except that he must not hinder or prevent it, and there is no suggestion that he has done so here. In my opinion time did not begin to run while she was at Cherbourg. Then the arbitrator relied on the words "to be absolutely free of turn." I quite agree as to the meaning of the words, but all is conditional upon her arrival. After her arrival she is to be discharged at a certain rate whether a berth is available or not, and to make the matter perfectly clear it says she is to be free of turn. These obligations of the charterers are conditional on the vessel arriving at or off the port of destination, which in this case was Havre. The truth of the matter is that the particular contingency which happened in this case had not been provided for, and as that particular contingency prevented the vessel from arriving as it was her duty to do before her time counted, the resulting loss must fall upon the ship and not upon the charterers.

Judgment for the charterers.

Solicitors for owners of steamship *Plata: Downing, Handcock & Co.*

Solicitors for Ford & Co.: *Botterell & Roche.*

J. F. C.

CHINESE MINING AND ENGINEERING COMPANY, LIMITED *v.* SALE & CO.

1917
June 19, 20, 25.

[1916 C. 2677.]

Ship—Time Charterparty—Requisition by Admiralty—Division of Admiralty Hire between Owner and Charterer—Proportions.

If during the currency of a charterparty, whether it be a charterparty for a voyage or for a definite period, the ship is requisitioned by the Admiralty in such circumstances that the charterparty is not terminated by reason thereof, and if the employment of the ship by the Admiralty is of a more extensive character and more onerous to the owner than that authorized by the charterparty, the hire paid by the Admiralty for the use of the ship, whether it be more or less than the charterparty hire, is divisible between the owner and the charterer in proportion to their respective interests in the ship. The proportion will be the ratio which the sum which the owner could properly demand monthly for altering the charterparty to a charterparty in the Admiralty form (including therein a sum sufficient to indemnify the owner against the extra expense incurred by him by reason of the employment of the ship by the Admiralty and such a sum as the owner might properly demand for consenting to any alteration of the charterparty) bears to the sum which the charterer could properly demand monthly for the loss of the benefit of the charterparty, to be fixed upon the basis of the value of the ship's services pursuant to the charterparty in the tonnage market. These sums must be calculated with reference to the values ruling at the date of the requisition and on the footing that the requisition will continue for an indefinite time, but will expire substantially before the expiration of the charterparty.

ACTION in the commercial list tried by Rowlatt J. without a jury.

The plaintiffs were the charterers of three steamships, the *Albiana*, the *Tungshan*, and the *Wimbledon*, of which the defendants were the owners. The charterparties were dated July 29, 1913, July 11, 1914, and December 24, 1913, and were each time charterparties, the periods of hire being five years from the dates of delivery to the plaintiffs, which were respectively May 10, 1913, May 25, 1914, and March 9, 1915. The charterparties were all in the same form, and provided for the employment of the ships in trade between ports in East Asia, excluding Siberian ports north of Vladivostock.

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The hire was payable monthly in advance, but in the event of loss of time from certain causes the hire was to cease until the ship was fit to resume the service. There were the usual exceptions, including restraints of princes.

On July 6, 1915, the *Albiana* was requisitioned by the Admiralty; she was returned to the plaintiffs on September 22, 1915, after which she was employed by the plaintiffs under the charterparty until December 18, 1916, when she was again requisitioned by the Admiralty, and she had continued to be employed by the Admiralty ever since that date. The *Tungshan* and the *Wimbledon* were requisitioned by the Admiralty in January, 1916, and had since then been continuously employed by the Admiralty. The *Tungshan* was sunk in the Mediterranean on May 17, 1917.

After the ships had been requisitioned the plaintiffs tendered to the defendants the amount of the charterparty hire, but the defendants refused to accept it.

The plaintiffs in this action claimed to be entitled to receive from the defendants the difference between the amount of the charterparty hire and the amount paid or to be paid by the Admiralty to the defendants in respect of the employment of the ships by the Admiralty. The defendants alleged that by reason of the requisitioning of the ships the charterparties were dissolved and terminated; and, alternatively, that if the charterparties were still subsisting the full amount of the compensation receivable from the Admiralty was divisible between the plaintiffs and the defendants according to their respective rights and interests, and, by counter-claim, the defendants asked for the direction of the Court as to the true proportions in which the compensation ought to be divided between the plaintiffs and the defendants.

By the Royal Proclamation of August 3, 1914 (No. 1247), the Lords Commissioners of the Admiralty were authorized to requisition any British ship or British vessel within the British Isles or the waters adjacent thereto "for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned . . . ."

MacKinnon, K.C., and *Raeburn*, for the plaintiffs.

Roche, K.C., and *R. A. Wright* (*Sir John Simon, K.C.*, with them), for the defendants.

[In the course of the arguments reference was made to *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1), in which Lord Parker said that the word "owners" in the Royal Proclamation of August 3, 1914, must "include all parties interested. It cannot in the present case mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests." The following cases were also cited:—*Modern Transport Co.* v. *Duneric Steamship Co.* (2), *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (3), *Andrew Millar & Co.* v. *Taylor & Co.* (4), *Horlock* v. *Beal* (5), *Anglo-Northern Trading Co.* v. *Emlyn Jones & Williams* (6), *Metropolitan Water Board* v. *Dick, Kerr & Co.* (7), *Countess of Warwick Steamship Co.* v. *Le Nickel Société Anonyme* (8), *Heilgers & Co.* v. *Cambrian Steam Navigation Co.* (9), *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (10), *The Okehampton.* (11)]

Cur. adv. vult.

June 25. ROWLATT J. read the following judgment:—In this case the plaintiffs were the time charterers of three steamers requisitioned by the Admiralty during the currency of the charters, and the question I have to decide is whether they or the defendants, who are the owners, are entitled to a sum representing monthly hire for these steamers, already paid by the Admiralty and still accruing. A third possibility is that both plaintiffs and defendants are interested in the fund in shares which have to be determined.

It is, in my judgment, essential to bear in mind the nature of the payment which the Admiralty has made—namely, that it is

(1) [1916] 2 A. C. 397, 428.
(2) [1917] 1 K. B. 370.
(3) [1917] 1 K. B. 222.
(4) [1916] 1 K. B. 402.
(5) [1916] 1 A. C. 486.
(6) Ante, p. 78.
(7) Ante, p. 1.
(8) (1917) 33 Times L. R. 291.
(9) (1917) 33 Times L. R. 348.
(10) (1917) 33 Times L. R. 390.
(11) [1913] P. 173.

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hire for the use of the vessels monthly. The charterers, though they had no possession of these ships under their charterparty, had a valuable contractual interest in their services, for the destruction of which the Crown might justly make compensation. But I have no fund of that kind to deal with, and, if the result of the action of the Government has been to destroy the charterparties, they have destroyed them without providing for compensation to the charterers. They have ignored them and have put themselves in the position of compulsory charterers direct from the owners, to whom in that case the hire they pay would belong. If, however, the charters are not destroyed, the charterers are bound to continue to pay the hire to the owners, and are entitled as between them and the owners to the use of the vessels, and, as pointed out by Lord Loreburn in the *Tamplin Case* (1), the owners must account for any hire received by them for such use. It is for these reasons that in order to determine the ownership of the fund in dispute it is necessary to see whether the action of the Government has destroyed the charterparties by virtue of what one may briefly refer to as the doctrine in *Paradine* v. *Jane* (2) as developed by modern cases.

That doctrine, as a general rule of the law of contracts, must apply to time charters as to other contracts. This was pointed out by my brother Atkin in *Lloyd Royal Belge Société Anonyme* v. *Stathatos*. (3) But there are many kinds of events and circumstances which in different connections have been held to call the rule into operation. The simplest case of all is where there has been destruction of specific subject-matter. There is, however, a very particular and special instance of its application, and that is where all that has happened is delay, but delay certain to be so prolonged as to destroy the possibility of performance of the contract as at all contemplated. To that special form of event destroying the contract the special designation of "frustration of the adventure" has been applied in the current legal language of to-day, and the question which has arisen with reference to time charters is not, as it seems to me, whether the general doctrine of *Paradine* v. *Jane* (2) is applicable to this class of contract, but

(1) [1916] 2 A. C. 397. (2) (1647) Aleyn, 26.
(3) 33 Times L. R. 390.

whether the special form of it in the case of inordinate delay is so applicable. It is obvious that where the contract is for the benefit of services over a period of time as opposed to the accomplishment of certain objects, the doubt may well occur whether the mere loss of time can put an end to the obligation. However, I think that doubt is now set at rest by authority so far as delay amounting to an interruption of the kind now in question is concerned, an interruption which, as I shall point out later, obviously operates to the infraction of the rights of both parties. Lord Loreburn in the *Tamplin Case* (1) clearly held that if the interruption was bound to eat up the whole time that would destroy the contract. Furthermore, I think it is settled that this result follows notwithstanding that the event leading to the delay is one the occurrence of which is prevented by an exceptions clause from giving rise to a claim for breach of contract. Lords Loreburn, Haldane, and Atkinson were clearly of that opinion in the *Tamplin Case.* (1)

In these circumstances it seems to me that the practical question which I have to consider is whether the requisition of these steamers, or any one of them, portended when made, or has at any time up to the date of trial come to portend,—for I am authorized by the agreement of the parties so to extend my inquiry—that the Government user would continue for substantially the remainder of the charter period. I use the words of Lord Loreburn in the *Tamplin Case.* (1) It was indeed argued by Mr. Wright, for the owners, that, independently of the question of time, the removal of the ships to a trade never agreed to by the owners in the charterparties entitled them to say the charters were at an end. But I do not think that point is open before me. If sound it would have afforded a short way to a decision in the *Tamplin Case* (1), where the interruption was as complete from both points of view as here. Now, upon the question of time there was evidence before me that the volume of requisitioning has been rapidly growing, and that to-day practically the whole of that class of British vessels with which this case is concerned is under requisition, so that there is very little chance of any of these ships being released during the war. Evidence was also given of statements made in Parliament on behalf of the Ministry confirming that view, and it was further

(1) [1916] 2 A. C. 397.

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suggested that requisitioning, or at least control, of shipping on the same scale would probably continue after the war. But the earliest of these charters to determine, namely, that of the *Albiana*, will not expire till December, 1918, and it seems to me that I cannot assume that the war will last till then, nor can I assume that the Government will interfere with these ships after the return of peace. At present I know of no power under which that could lawfully be done, and, even if they had the general power conferred upon them, I cannot assume that they will find it necessary to apply it to these particular ships. It is true that the ships have been taken for an indefinite time, and that no one can say that this state of affairs will terminate before the charters would have expired, even in the case of the latest of them, that of the *Tungshan*, which would have continued, had she not been sunk, till March, 1920. But I do not think that I am at liberty to look at it in that way. I think I must approach it as Lord Loreburn did when he said that it must be "established" that the interference would last substantially to the end of the charter period. In the result on this part of the case I come to the conclusion that none of these charterparties has come to an end.

The question remains whether the charterers are entitled to the whole of the Admiralty hire or whether they must share it with the owners. It is to be observed that in this case the use of the vessels by the Admiralty is not such as the charterers could have enjoyed themselves under their charterparties or conferred on others by sub-charters. If that had been the case the Admiralty hire would have been paid for something which it lay exclusively in the hands of the charterers to enjoy or transfer without any right in the owners to object. The compulsory charter to the Admiralty would have been equivalent to a compulsory sub-charter taking effect entirely out of the charterers' interest, and the charterers would have had to be regarded as solely entitled to the position of owners for the purposes of the Admiralty charterparty and as such solely entitled to the Admiralty hire. Here, however, the Admiralty hire is being paid partly in respect of a use of the vessels to which the charterers were not entitled to put them in return for the hire which they pay to the owners. Therefore the Admiralty charter takes effect partly out of the interests of the

charterers and partly out of that of the owners. Under these circumstances the Admiralty hire must clearly be divided between the two, as was pointed out by Lord Parker in the *Tamplin Case*. (1) It was agreed that the figures were to be referred, but I think I ought to give some guidance as to the principle to be followed. The evidence before me showed that the conditions of the Admiralty charter were more onerous to the owner, as involving him in higher payments for insurance and other disbursements, than the conditions of the plaintiffs' charters, and this certainly is one element to be considered. I understood Mr. MacKinnon, for the charterers, to suggest that the owners should be compensated for any extra expense of this kind, and that the charterers should take the balance. I do not think this is correct, nor, if the Admiralty hire were lower than it happens to be in this case, would it always be just to the charterers. I think a proportional division must be made in every case, even where the Admiralty hire is less than the hire paid by the time charterers. However small it is, it forms the only fund out of which both parties must be paid for the invasion of their respective rights and interests, and paid pari passu in the proper proportions. This proportion must be found by ascertaining as fairly as possible, first, what the owners could properly demand monthly for altering the charter to the Admiralty form, and, secondly, what the charterers could properly demand monthly for the loss of the benefit of the charter. The first sum should not only include what is necessary to indemnify the owners against extra expense, but also something to represent what they might reasonably have asked for consenting to alter the charter at all. If they had been free they could have bargained for that. The second sum must not include anything for special loss possibly inflicted upon the charterers by reason of dislocation of the trade for which they happened in fact to require the ships, but must be fixed upon the basis of the value of the ships' services pursuant to the time charters in the tonnage market. The ratio between the two sums will be the ratio in which the Admiralty hire will be divided. As that hire must be treated as fixed on the day of the requisition, the two sums forming the ratio must be calculated with reference to the values ruling on that same day. Further, they must be calculated

(1) [1916] 2 A. C. 428.

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on the footing that the requisition is to last for an indefinite time, but to expire substantially before the expiry of the time charters. This is because, as it seems to me, the prospective length of the interruption may possibly have a bearing even upon the rate per month which the respective parties may be regarded as justly demanding.

There will be liberty to apply as to the form of the reference and of the declarations.

Solicitors for plaintiffs: *Ashurst, Morris, Crisp & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

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June 12, 13, 28.

T. & J. HARRISON AND OTHERS *v.* KNOWLES & FOSTER.

[1916 H. 929.]

Contract—Sale of Ships—Particulars—Incorrect Statement as to Dead-weight Capacity—Condition or Warranty—"Not accountable for errors in description"—Seller not liable.

The defendants, being desirous of selling two steamships to the plaintiffs, gave to the plaintiffs particulars in writing of the ships which stated, inter alia, that the dead-weight capacity of each ship was 460 tons. The particulars also contained the words "not accountable for errors in description." The plaintiffs, relying upon the particulars, agreed to buy the ships, and a memorandum of the contract, which did not in terms refer to the particulars, was signed by the parties. The ships were delivered to, and accepted by, the plaintiffs, and it was subsequently discovered that the dead-weight capacity of each ship was only 360 tons. In an action by the plaintiffs to recover damages for a breach of a condition of the contract, and, alternatively, for breach of warranty:—

Held, first, on the evidence, that the memorandum was not intended by the parties to contain all the terms of the contract, and that the statement as to the dead-weight capacity was a term of the contract; secondly, that the discrepancy between the statement and the fact was a difference of degree and not of kind, and that the statement was, therefore, a warranty and not a condition; and, thirdly, that, the statement being a warranty, the defendants were, by reason of the words "not accountable for errors in description," not liable for damages for breach of warranty.

ACTION in the commercial list tried by Bailhache J. without a jury.

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The plaintiffs claimed damages for a breach of a condition in a contract for the sale of two steamships by the defendants to the plaintiffs. Alternatively, they claimed damages for a breach of warranty.

The facts and arguments appear from the judgment.

Roche, K.C., and *R. A. Wright*, for the plaintiffs.
Greer, K.C., and *A. Neilson*, for the defendants.

Cur. adv. vult.

June 28. BAILHACHE J. read the following judgment:—In this case the defendants, in October, 1915, wished to sell two sister steamships, the names of which have since been changed to the *Mafia* and the *Pemba*. They were built to carry passengers and cargo. In furtherance of this object the defendants prepared written particulars of the boats and handed them to a Mr. Staveley Taylor, a shipbroker, who in turn placed them before the plaintiffs. Thereupon the plaintiffs bought the steamships for 10,000*l.* each. In the particulars prepared by the defendants the steamships were described as having a dead-weight capacity of 460 tons all told. The document also contained these words: "Not accountable for errors in description." A memorandum of the contract was drawn up by Mr. Taylor and signed by him on behalf of the plaintiffs and by the defendants on December 9, 1915.

When the *Pemba* was loading at Cardiff in April, 1916, it became apparent to Mr. Balfour, the plaintiffs' marine superintendent, that she would not carry anything like 460 tons; he thought probably not more than 371 tons; and he found in the ship the builders' displacement scale which gave her a dead-weight capacity of 340 tons. Mr. Balfour informed his owners of these facts, and they communicated with the defendants, and invited them to take part in an experiment to test what the actual dead-weight capacity was. This invitation the defendants declined. A very careful experiment was conducted on the *Mafia*, the sister ship of the *Pemba*, under the superintendence of Mr. Swainston, and in the result, after making due allowance for certain alterations which had been made in the steamship, it was proved that her

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dead-weight capacity at the date of sale did not exceed 360 tons. I accept the evidence given on this point; if it is that of the plaintiffs' witnesses only, the fault lies with the defendants.

This discrepancy was of special importance to the plaintiffs, as they had intended to use the steamships on the East African rivers to fetch and carry cargoes from and to their ocean liners. The difference would obviously seriously affect their value to any buyer. I do not think the special purpose for which the plaintiffs bought the steamships was sufficiently brought to the defendants' attention, but there was unchallenged evidence before me that their value in the market was less by 2250*l*. each than it would have been if their dead-weight capacity had been as described.

The plaintiffs have accepted the steamships, and this action is to recover the sum of 4500*l*. as damages. The claim is framed alternatively. It is said, first, that the dead-weight capacity given in the particulars submitted to the plaintiffs was a condition of the contract, or, alternatively, that it was a collateral contract or warranty. It is not suggested that the misdescription of the dead-weight capacity was in any way dishonest, although, strangely enough, the probability that the lifting capacity of these steamships was lower in relation to their cubical capacity than is usually the case was brought to the attention of both the defendants and Mr. Taylor in May, 1915, when the defendants were making an earlier effort to sell the steamships. Both they and Mr. Taylor had forgotten this.

The question for me to determine is, therefore, whether an innocent mistake in the dead-weight capacity of these steamships made in the defendants' particulars of them shown to the plaintiffs, and on which they bought, entitles the plaintiffs to damages. The plaintiffs do not seek to rescind the contract. Now, for this purpose I take it to be clear that an action for damages will not lie for a innocent misrepresentation unless that misrepresentation is contractual, when it becomes either a condition or a warranty: see *Heilbut, Symons & Co.* v. *Buckleton.* (1) Further, I take it to be clear that when the parties to a contract have reduced it into a writing which is intended by them to contain the whole of its terms no parol evidence can be given to alter or add to the written contract.

(1) [1913] A. C. 30.

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The defendants' first point is that such is the case here, and that, the plaintiffs, having by their agent signed the memorandum of December 9, 1915, cannot be heard to say that the particulars furnished to them by the defendants form part of the contract between the parties. This point is good or bad according to the view one takes of the memorandum. Was it intended by the parties to be complete in itself and to contain all the terms of the contract? I think that it was not. The intrinsic evidence of the document itself strongly supports this view.

There is the further fact that the defendants themselves did not so regard it. As early as December 14 they referred to certain items in their particulars, not repeated in the memorandum, as forming part of the contract, and again on January 6, 1916, when a question arose as to coal consumption, the defendants wrote "The vessel was sold to you as having a consumption of ten tons of coal per day," a reference to their particulars and not to the memorandum of December 9. Mr. Staveley Taylor's evidence, which I accept, was to the same effect. I may therefore read into that memorandum such parts of the defendants' particulars as are not inconsistent with the memorandum. The law on the subject is nowhere, I think, better expressed and illustrated than in the judgment of Bruce J. in *Lloyd* v. *Sturgeon Falls Pulp Co.* (1)

The statement, therefore, that the dead-weight capacity of the steamships was 460 tons was contractual and incorrect. The normal result would be that the defendants must pay damages. The defendants' particulars contain, however, the words "Not accountable for errors in description," and I have to consider their effect. In order to do this it seems necessary that I should first determine whether the statement as to dead-weight capacity was a condition or a warranty. It is true that where goods have been accepted the remedy for breach of a condition is the same as the remedy for breach of a warranty, but there are cases which seem to indicate that qualifying words, such as are used here, do not apply to actions for damages for breach of a condition: see *Wallis, Son & Wells* v. *Pratt & Haynes.* (2) The authorities are numerous and conflicting: see, for instance, on the one hand,

(1) (1901) 85 L. T. 162. (2) [1911] A. C. 394.

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Howcroft v. *Laycock* (1), and, on the other hand, *Taylor* v. *Bullen*. (2) Nor have I been able to discover any principle on which to reconcile the decisions.

I proceed, therefore, to the difficult task of deciding between condition and warranty, and I have come to the conclusion that the rule to apply is that where the subject-matter of a contract of sale is a specific existing chattel a statement as to some quality possessed by or attaching to such chattel is a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract. Applying this principle here, and making, I hope, full allowance for the importance of the statement about dead-weight and the serious discrepancy between that statement and the true fact, it seems to me that the difference is essentially one of degree and not of kind, and that the statement as to dead-weight capacity was a warranty and not a condition.

An extreme instance of the application of the rule I have laid down for myself will be found in *Barr* v. *Gibson*. (3) An instance the other way will be found in *Varley* v. *Whipp* (4), and the illustrations given by Channell J. in that case show the difficulty of drawing the line between conditions and warranty in any given case. I am anxious to make it clear at the expense of reiteration that I am confining my observations to the sale of an existing specific chattel.

Having decided, therefore, that the particular representation relied upon here is a collateral warranty, there remains for decision the effect to be given to the words "Not accountable for errors in description." I have come to the conclusion that the effect of these words, at any rate where the particular quality which is misdescribed is in the nature of a collateral warranty, is to prevent the defendants from being liable in damages for the error. My judgment must therefore be for the defendants, with costs.

I may add that I should have thought that a prudent buyer faced with a document so qualified as the defendants' particulars were in this case would either have made his own experiments or insisted upon the deletion of the qualifying words. The more so,

(1) (1898) 14 Times L. R. 460.
(2) (1850) 5 Ex. 779.
(3) (1838) 3 M. & W. 390.
(4) [1900] 1 Q. B. 513.

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as it is obvious from the particulars that the defendants arrived at the dead-weight capacity by the simple process of dividing the cubical capacity by 40, thus making the assumption that the vessel's lifting capacity was sufficient for a cargo, 40 cubical feet of which weighed one ton, a rule of thumb principle often applied in making a rough estimate of a cargo vessel's dead-weight capacity, but liable to be entirely inaccurate if the vessel is of unusual weight or design, and quite unreliable, one would suppose, as applied to these steamships. It may be that the state of the shipping market at the end of 1915 was such that the plaintiffs were content to take risks which in normal times they would have declined.

Judgment for defendants.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Botterell & Roche.*

F. O. R.

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July 3, 6.

Charterparty—Time Charter—Hire to cease on Loss of Ship—Requisition of Ship by Admiralty—Loss by War Risks—Right of Charterers to share in Admiralty Compensation.

By a time charter entered into in June, 1914, the use of the ship was let to the charterers for a period of eight years, but it was provided that if she was lost the hire was to cease on the day of her loss. In January, 1917, the ship was requisitioned by the Admiralty on the terms that, in the event of her being lost by war risks, they would pay compensation on her ascertained value. Shortly afterwards, and while the ship was so under requisition, she was sunk by the enemy:—

Held, that the compensation money payable by the Admiralty on the loss of the ship belonged wholly to the owners, and that the charterers had no right to share in it.

TRIAL of action before Rowlatt J.

The plaintiffs were the owners of the steamship *Rio Colorado*. By a charterparty dated June 5, 1914, they let the said steamship to the defendants for a term of eight years, two months, and eighteen

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days from that date. By clause 2 of the charterparty, "The owners . . . . shall pay for the insurance of the vessel," and by clause 18, "Should the vessel be lost the hire is to cease and determine on the day of her loss . . . . and any hire paid in advance and not earned shall be returned and paid to the charterers. Provided nevertheless and it is hereby agreed that should the vessel be lost . . . . the owners to have the right to substitute another steamer of similar type and class and approximately the same carrying capacity, to continue this charter on the same terms and conditions at any time during its currency." On January 17, 1917, the ship was requisitioned by the Admiralty on the terms of the Admiralty charterparty, Form T.99, by clause 19 of which the Admiralty undertook liability for loss or damage by war risks: "Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury. Should a dispute arise as to the value of the steamer the same shall be settled as laid down in clause 31"—that is by arbitration in the manner therein provided. On or about March 22, 1917, the ship was totally lost by a war risk, and the Admiralty were prepared to negotiate with the plaintiffs the value of the steamer and to pay to the plaintiffs 80,000*l.* on account, and the balance upon the actual ascertainment of the value. By a letter dated March 30, 1917, the defendants gave formal notice to the Admiralty that they claimed to be interested in any moneys payable in respect of the loss of the steamer and that the Admiralty were not to agree the amount payable to the plaintiffs without the defendants' concurrence, and that the defendants claimed the right to attend and take part in the arbitration. By reason of that notice the Admiralty refused to make any payment to the plaintiffs or further to deal with their claim without a banker's guarantee to refund any money paid to them. The plaintiffs accordingly brought this action claiming a declaration that all payments to be made by the Admiralty in respect of the ascertained value of the steamship *Rio Colorado* by reason of the loss of the said vessel belonged to the plaintiffs, and that the defendants had no right to receive or share in such payments or to be present at any arbitration in respect thereof.

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Douglas Hogg (*Sir John Simon, K.C.*, with him), for the plaintiffs. Under the time charter the charterers' interest in the ship was limited, not merely by the period for which the hiring was expressed to run, but also by the life of the ship. If she was lost the owners had an option of continuing the charterparty by substituting another ship, but the charterers had no right to require them to do so. The charterers' interest in her ceased immediately upon the loss. The loss of the ship had precisely the same effect as if the hiring had expired by effluxion of time. If she had been lost by a marine peril which was insured against, or sunk by collision with another ship that was in default, the charterers could not possibly claim to share in the money recovered from the underwriters or the persons in default, as the case might be. But if so, neither can they claim to share in the compensation payable by the Admiralty. The Admiralty are in the position of insurers, and the rights of the parties must be just the same whether the ship was lost by a marine risk or a war risk. As freights had risen greatly since the commencement of the war it was no doubt to the interest of the charterers that the vessel should not be lost, but that was a contingency against which they ought to have insured.

Roche, K.C., and *Robertson Dunlop*, for the defendants. The charterers had an insurable interest in the ship in respect of her capacity of earning a higher freight than that which they had contracted to pay. The Admiralty by requisitioning the ship on the terms of the form of charterparty, T.99, undertook to insure all the parties who were interested in the ship, the charterers as well as the owners. They relieved the one party from the necessity of insuring as much as the other. In *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) Lord Parker, speaking of the fact that the Government has under the terms of the Royal Proclamation of August 3, 1914, to pay compensation to the "owners," says: "Owners must in this Proclamation include all parties interested. It cannot in the present case mean the owners exclusive of the charterers, or charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the

(1) [1916] 1 A. C. 397, 428.

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amount so agreed will be divisible between them according to their respective rights and interests." The time at which those interests must be considered is not after the loss has occurred, but the moment before the loss. It was the living ship that was insured. The defendants had an interest which the Arbitration Board might properly take into consideration in awarding the compensation. The plaintiffs have no right to ask this Court to prejudge the matter by a declaration that the defendants are not so entitled: *Barraclough* v. *Brown*. (1)

Sir John Simon, K.C., in reply. In the *Tamplin Case* (2) Lord Parker was dealing with a ship that was still in existence, and the charter of which had some time to run, so that the charterers were still interested. Here the charterparty had terminated, and the charterers had ceased to have any interest at all.

Cur. adv. vult.

July 6. ROWLATT J. read the following judgment:—In this case the plaintiffs had chartered a steamer to the defendants for eight years odd, from June, 1914. In January, 1917, the Government requisitioned the steamer upon terms, so far as material for the present case, of the form of charter known as T.99, by which the Government assumed war risks on her ascertained value. Early in the present year the ship was lost by war risks, and the present action is for a declaration that the sum to be paid by the Government in respect of the loss belongs solely to the plaintiffs.

Under the original time charter between the plaintiffs and the defendants the position was that the plaintiffs were to insure, and that in the event of the loss of the ship the charter was to terminate, with an option to plaintiffs to substitute another ship. The plaintiffs could insure or not as they pleased, and against such risks as they chose. Owing to the circumstances arising out of the war shipping increased enormously in value, but owing to the time charter the owners would in fact enjoy no increased profit from the working of the ship for the remainder of the eight years. Nevertheless, if they chose to insure the ship at her increased value they would be entitled to do so, and, seeing that if the ship was lost they would have to pay such increased value to replace

(1) [1897] A. C. 615. (2) [1916] 2 A. C. 397, 428.

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her, it would have been a prudent thing for them to do. If they had done this, and there had been no requisition, and the ship had been lost by a peril insured against (whether peril of war or peril of the sea), I cannot conceive that the right of the owners to receive and hold the whole of the insurance money could have been questioned. Further, when the Government requisitioned, had the Government charter provided that the owners should insure against war risks it would, I imagine, have been equally clear that they would have been entitled to the whole of the benefit of the policy, just as under the actual form of Admiralty charter they would have been entitled to the whole of the benefit of any insurance against ordinary risks, if the ship had been lost by ordinary perils. But by the Government charter, T.99, the Government assumed the war risk, thereby making it unnecessary for the owners to insure such risks. It seems to me quite clear, subject to the argument which Mr. Roche addressed to me, that the owners should enjoy the benefit of that term in the charter, just as they would have enjoyed the benefit of a policy giving them the same protection. But Mr. Roche put forward this argument: The Order in Council, he said, under which the Government requisitioned, provided for compensation to the owners. For the purposes of the enjoyment of the benefit of the Admiralty charter (which did not destroy the time charter) the defendants, as between themselves and the plaintiffs, are entitled to share the position of owners with them. The provision of the Admiralty charter by which the Government assume war risks, continued Mr. Roche, is part of the compensation given to the owners. So be it; but it does not follow that because the defendants are entitled to an interest in the benefits of the charter, speaking generally, they are entitled to share in every element of such benefit. The parties must share the benefit or compensation according to their interests; and this part of it is in respect of an interest entirely the plaintiffs', namely, that in having the ship, if lost, replaced by a sum of money equivalent to her value, which, the charter coming to an end by that loss, would be entirely the plaintiffs'. Mr. Roche says this is a fallacy, because it treats the insurance moneys as something accruing after the loss of the ship and the consequent determination of the charterparty, whereas those moneys replace a floating and

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still chartered ship. But this is not so: the ship has been converted into money by the same event as determines the interest of the charterers; and the owners take the money, as they would have taken the ship had the charter been determined by some other event, or by effluxion of time.

But I may put the case in another way. I cannot but think that the argument of the defendants is based upon a false idea generated by the use of the word "compensation." It suggests that there must be compensation, not for the use of the ship by the Government, but for the accident that during that use an event happened which determined the charterparty. The charterers had the use of the ship subject to the possibility of that event happening. They could have insured against that event had they been so minded. The Admiralty took the vessel, and the charterers still remained exposed to the possibility of that event happening; and if the Admiralty did not take her for voyages other than those in which the charterers could have employed her, the risk of determination of the charter would have been the same, and this risk could have formed no element in any possible claim by the charterers for compensation under the Order in Council. If, on the other hand, the Admiralty put her to a use enhancing the risk of the charter being determined, this might have formed the subject of a claim of a very special character by the charterers. The assumption of war risks by the Admiralty is not, however, even to the slightest extent, by way of satisfaction of any such claim as that. It merely provides for the hire and insurance of a chattel.

For these reasons I think the plaintiffs succeed. It was argued that the claim for a declaration was misconceived as tending to prevent the defendants resorting to the arbitral tribunal, which has jurisdiction to deal with any claim they may make. I do not debar the defendants from making any claim they think they can put forward so long as they do not claim in respect of the assumption by the Government of the war risk on the ascertained value of the ship. This claim I decide the plaintiffs are alone entitled to make.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Maxwell & Dampney.*

Solicitors for defendants: *Paines, Blyth & Huxtable.*

J. F. C.

NORTH LONDON AND GENERAL PROPERTY COMPANY, LIMITED *v.* MOY, LIMITED.

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June 18.

[1917 N. 381.]

Landlord and Tenant—Payment of Rent—Deduction of Property Tax by Tenant—Payment by Tenant to Collector of Tax—Production of Collector's Receipt to Landlord—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 40—*Revenue* (*No.* 1) *Act*, 1864 (27 & 28 *Vict. c.* 18), *s.* 15.

Where a tenant covenants with his landlord to pay the rent of the demised premises, the landlord is entitled, before being called upon to allow, by way of deduction from or discharge of rent due from the tenant, a payment of property tax made by the tenant to the Inland Revenue authorities, to see the collector's receipt for the payment of the tax. The landlord is not bound to go to the tenant for the purpose of inspecting the receipt; it is the duty of the tenant to take it to the landlord.

ACTION set down in the Short Cause List and tried before Low, J.

The action was brought to recover from the defendants (whose registered office is at Greenland Place, Camden Town) 48*l.* 15*s.*, being as to 40*l.* for one quarter's rent due March 25, 1917, under a covenant by the defendants in a lease dated April 11, 1904, of premises, 116, Bayham Street, Camden Town, for eighteen years (less seven days) from September 29, 1904, whereby the defendants covenanted with the plaintiffs to pay them rent for the premises during the term at the rate of 160*l.* a year, by equal quarterly payments on the usual quarter days, and as to 8*l.* 15*s.* for one quarter's rent due March 25, 1917, under a covenant in a lease dated April 26, 1910, of premises, 118, Bayham Street, Camden Town, for twelve and a half years (less seven days) from March 25, 1910, whereby the defendants covenanted with the plaintiffs to pay them rent for the premises during the term at the rate of 35*l.* a year by equal quarterly payments on the usual quarter days.

By a notice of defence the defendants alleged that they paid the 48*l.* 15*s.* on or about February 9, 1917, to the collector of income tax house duty and land tax in respect of assessment for the year ending, for income tax and house duty, on April 5, 1917, and for land tax on March 24, 1917, in respect of the respective premises; the

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payments being made under the Income Tax Act, 1853, s. 40, and the Revenue (No. 1) Act, 1864, s. 15, and other statutes thereunto enabling them. They further alleged that they had always been ready and willing to give inspection to the plaintiffs of the two receipts for the respective sums of 40*l.* and 8*l.* 15*s.* given by the collector, and dated February 10, 1917, and that they duly notified the plaintiffs of their willingness to give such inspection on repeated occasions by (inter alia) a letter dated May 9, 1917, and addressed to the plaintiffs' solicitors by the defendants from their registered office, Greenland Place, Camden Town.

On May 7, 1917, in reply to a letter from the plaintiffs' solicitors asking for a cheque for the 48*l.* 15*s.*, the defendants wrote a letter saying that the quarter's rent of 116 and 118, Bayham Street to March 25 last, 48*l.* 15*s.*, was balanced by the landlord's property tax (being 5*s.* in the pound) "of the same amount paid by us on February 9." On May 8 the plaintiffs' solicitors wrote in reply: "We have repeatedly asked you to produce to us the receipts for property tax paid, and we therefore cannot send you a receipt for the rent until you do so, nor can we allow the deduction. Please therefore send us the property tax receipts for the last three years for our inspection." On May 9, 1917, the defendants sent to the plaintiffs' solicitor a letter which (so far as material) was as follows: "Greenland Place. We shall be pleased to show your representative the receipt for the landlord's property tax paid on February 9 last . . . . if you will favour us with a call." Neither the plaintiffs nor their solicitors called at the defendants' office to inspect the receipts, their contention being that the defendants were bound in law either to pay the rent or to send the receipts for the equivalent of the rent to them for inspection, and that until the defendants had done so there had, in law, been no payment of the rent by them.

At the trial it was not disputed that the defendants had in fact paid 48*l.* 15*s.* by way of property tax on or about February 9, 1917.

Whately, for the plaintiffs. Before the defendants can claim to be allowed a deduction from the rent of an amount paid by them for property tax they must prove the payment by producing to the plaintiffs the receipt showing that they have made it.

[He was stopped.]

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Warren, for the defendants. The defendants have always been ready and willing to produce to the plaintiffs the receipts for the amounts they have paid for property tax, but not to send them to the plaintiffs. Strictly, the plaintiffs are bound to accept the statement of the defendants that they have paid the tax. Or if they choose they can inquire of the income tax authorities. In *Barnes* v. *Kyffin* (1) the defendant had not in fact paid the property tax. The inference from that decision is that if he had paid the tax he would have been entitled to deduct the amount from the rent. The payment of the tax is in discharge of the rent. A debtor who has in fact paid a debt to a creditor and obtained a receipt is not bound to produce the receipt if the creditor claims payment again. At the time this action was commenced no rent was owing to the plaintiffs, as it had been discharged by the payment of the landlord's property tax. The plaintiffs could have gone to the defendants and seen the receipts. Production at the defendants' registered office, which is reasonably near to the demised premises, is sufficient. It is not necessary that it should take place on the demised premises. But as the defendants were always ready and willing to produce the receipts the question whether the plaintiffs were entitled to see them does not arise. In strictness the defendants were not bound to produce them. In *Tinckler* v. *Prentice* (2) the property tax had in fact been paid before action brought, and there was no suggestion that the tenant must produce the receipt. In *Pocock* v. *Eustace* (3) the tenant had not paid the property tax, and Lord Ellenborough's dictum that the tenant must produce the receipt is obiter. In *Baker* v. *Davis* (4) the question of the production of the receipt did not arise. In *Philips* v. *Beer* (5) it was held that the assessment need not be produced by the tenant. *Clennel* v. *Read* (6) does not show that if the tenant had not tendered the receipt he would not have been entitled to a set-off. [*Smith* v. *Lion Brewery Co.* (7) and *In re Sturmey Motors* (8) were also referred to.]

Whately in reply. This is an action on a covenant to pay rent,

(1) [1916] W. N. 166.
(2) (1812) 4 Taunt. 549.
(3) (1809) 2 Camp. 181.
(4) (1813) 3 Camp. 474.
(5) (1815) 4 Camp. 266.
(6) (1816) 7 Taunt. 50.
(7) [1909] 1 K. B. 711.
(8) [1913] 1 Ch. 16.

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and the defendant must prove payment or its equivalent. He has not proved either. *Haldane* v. *Johnson* (1) shows that the tenant is bound to take his rent to the landlord where there is a covenant to pay, and he is equally bound to take the receipt for property tax. The customary notice indorsed on the collector's receipt contains the statement that it should be produced to the landlord.

Low J., after stating the facts, continued: The sole question that arises in this action is whether the landlord before allowing property tax as a deduction from, or in payment of, the rent due is entitled to evidence of the payment, and, if so, what evidence and in what manner and form. It is somewhat remarkable that, although the legislation which makes property tax under Schedule A of the Income Tax Act, 1853, payable in the first instance by the tenant and compels the landlord to allow the payment as a deduction from the rent has been in force at least since 1806 (2), this question has never been, so far as reported cases show, raised or decided. There is no question—and I think I am entitled to take judicial notice of the fact—that during the whole period the practical business course followed by landlords and tenants has been for the tenant to produce to his landlord the receipt for the tax, and upon that evidence the landlord has allowed the amount. So crystallized has this practice become that it is referred to on the form of receipt issued by the Commissioners of Inland Revenue, in which they call attention to the fact that the landlord is bound under a penalty of 50*l.* to allow out of the first payment of rent due the amount of tax deductible; and the form goes on to add that the receipt should be produced when the allowance is claimed. It is quite clear from the decision of Lord Ellenborough in *Pocock* v. *Eustace* (3) that even in 1809, three years only after the Act 46 Geo. 3, c. 65, was passed, it was the practice to produce the receipt. There is also a reference to the same practice in *Clennel* v. *Read* (4), where the receipt is itself pleaded as a tender.

(1) (1853) 8 Ex. 689.

(2) See 46 Geo. 3, c. 65, s. 74, Sched. A, No. 4, Rule 9; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40; Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15.

(3) 2 Camp. 181.

(4) 7 Taunt. 50.

In the absence of direct authority it seems to me that I am entitled to look at what has been the practice over a very long number of years, and also to consider what must have been the intention of Parliament when imposing these duties and obligations on landlords and tenants. It is quite clear that the best—and indeed the only—evidence of payment is the official receipt issued under the direction of the Commissioners of Inland Revenue. Could it have been contemplated that, the landlord being placed under a severe penalty if he did not allow payment of property tax by the tenant as a deduction from, or as an equivalent to payment of, the rent, there should not be placed upon the tenant the very reasonable and common-sense obligation of producing the receipt for the moneys he has paid? I cannot help thinking that the real reason for the absence of authority upon the point is that no one hitherto has been sufficiently bold or cantankerous to raise it. I am therefore clearly of opinion that the landlord is entitled before being called upon to allow by way of deduction from, or, as in the present case, in total discharge of, the amount due for rent, to see the receipt for the amount which the tenant has paid, and which he claims to deduct, or to be allowed.

A further question, and the only one which seems to require any discussion or consideration, has been raised—namely, whether the tenant is bound to take the receipt to the landlord, or the landlord is bound to go to the tenant to inspect the receipt. In the ordinary relation of debtor and creditor it is the duty of the debtor to seek the creditor, and one would have thought that it could scarcely be doubted that when a person is claiming to keep money in his pocket which, in the absence of certain conditions, he is clearly bound to pay it is his duty to go to his creditor and to satisfy him by reasonable evidence that the payment has been discharged or is not due.

In the present case the action is brought on a covenant in a lease, and I am strengthened in the view I have expressed by the decision in *Haldane* v. *Johnson*. (1) In that case Martin B., in giving the judgment of the Court, said: "We are therefore of opinion, that a covenant for the payment of rent, at the time and in manner as reserved, when no particular place of payment is mentioned, is

(1) 8 Ex. 689, 696.

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analogous to a covenant to pay a sum of money in gross on a date certain, in which case it is incumbent upon the covenantor to seek out the person to be paid, and pay or tender him the money, and for the simple reason, that he has contracted so to do." In that case it was contended that in such an action it was necessary to go through the ceremonies which make up the incidents of a common law demand. Martin B. holds that in an action upon a covenant nothing of the sort is necessary, that the ordinary doctrine applies, and the covenantor is bound to seek out the covenantee and to render to him his obligation under the covenant. Now it seems to me that that has all direct application to the present case. It is admitted that the rent was due and payable unless the defendant was discharged from payment by having paid the Inland Revenue authorities. He is bound to satisfy the landlord by reasonable evidence to that effect, and the same obligation which imposes upon him the duty of going to the landlord and paying his rent to him seems to me to impose upon him the duty of taking to the landlord that which was the equivalent of payment, namely, the receipt which he had received from the Inland Revenue authorities, upon paying the property tax. In *In re Cooper* (1) Cozens-Hardy M.R. seems to have taken much the same view with regard to the payment of yearly interest from which is deductible income tax under precisely the same section and schedule as it is made deductible from rent. He said "I am not personally satisfied, although I do not desire to decide this question, that, even if this interest were 'yearly interest' in respect of which the judgment debtor could claim a deduction, any claim could be made unless and until he had himself paid the income tax and produced evidence to that effect: in other words, whether the time ever arrives when he can claim a deduction until he can say 'Income tax is payable on this, I have paid it and I prove it to you.' No such case, of course, is made here." It is rather interesting that in so far as machinery is concerned the statement of the Master of the Rolls made in the year 1911 seems to me to be in exact accord with the view of Lord Ellenborough in 1809. On behalf of the defendants it has been contended that both these statements are obiter. In a sense no doubt they are, but in dealing with such a point as this I consider

(1) [1911] 2 K. B. 550, 554.

myself entitled to look at these statements of learned judges, widely separated in time, but showing at all events a clear view as to what the duties of persons claiming abatement or deduction are.

The practical question which I have to decide in this case is who is to pay the costs? With regard to that it is interesting in the present condition of affairs in this country to notice that persons have still so much time on their hands, and so much money to spare, that they are ready and willing to raise such points as this. I am happy to think that it is within my power to make persons raising them pay for the pleasure and privilege of doing this, and I therefore give judgment for the plaintiffs with costs, and if any question arises with regard to the scale the costs will be on the High Court scale.

The practical effect is that the only judgment against the defendants is that they are to pay the costs of this action.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Stanley Evans & Co.*

Solicitors for defendants: *Jennens & Jennens.*

J. E. A.

1917
June 27.

SARGEANT *v.* WATTS.

County Court—Remitted Action—Costs—Jurisdiction of County Court Judge—County Court Rules, 1903 *and* 1914, *Order* LIII., *r.* 17—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 66, 113, 116.

Order LIII., r. 17, of the County Court Rules, 1903 and 1914, which provides that "Where the demand is unliquidated, and the plaintiff recovers less than the amount claimed, the judge may, if he thinks fit, order that his costs be taxed on the scale applicable to the amount claimed, or any intermediate scale," is not ultra vires, and it applies to actions remitted to the county court as well as to actions commenced there.

Everall v. *Brown* [1905] 2 K. B. 196; [1906] 2 K. B. 884 applied.

APPEAL from Marylebone County Court.

The plaintiff commenced an action in the High Court against the defendant, claiming 100*l.* as damages for a trespass and the removal and detention of certain goods. The defendant delivered a defence and counter-claim, and thereafter an order was made under s. 66 of the County Courts Act, 1888 (1), remitting the action to the county court. At the trial the county court judge awarded the plaintiff 15*l.* 15*s.* as damages for the trespass, the defendant to return certain goods in his possession, and on the counter-claim the judge awarded the defendant 11*l.* 11*s.*, with costs appropriate thereto, and he gave the plaintiff costs of the action under scale B of the county court scale.

The county court judge in his notes said: "On the question of costs, defendant's counsel submitted that I had no power to grant costs on a scale higher than that applicable to the amount recovered —referring to s. 116 of the County Courts Act, 1888. (2) . . . . As

(1) County Courts Act, 1888, s. 66, after providing that certain actions of tort commenced in the High Court may be remitted to the county court, enacts that where such an order is made the action and all proceedings therein shall be tried and taken in the county court as if the action had been originally commenced therein, "and the costs of the parties in respect of the proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts. . . . ."

(2) County Courts Act, 1888, s. 116: "With respect to any action brought in the High Court

to this point s. 66, as to remitted actions of tort, provides that the costs previous to remitter shall be allowed on the High Court scale, and after remitter on the county court scale. This must be read subject to s. 116, and I held that under the two sections I could not give plaintiff any costs on the High Court scale; but I further held that I could give him county court costs on a scale higher than that applicable to the sum recovered under Order LIII., r. 17. (1) . . . . I held that this rule applies to remitted actions which after remitter become county court actions for all purposes; and I thought it right to exercise this power having regard to the manner in which the case had been conducted previous to the trial."

The defendant appealed.

Horton-Smith, for the defendant. First, Order LIII., r. 17, under which the county court judge purported to act, has no application to remitted actions. Sect. 113 of the County Courts Act, 1888, gives the Court a discretion only as to costs "not herein otherwise provided for," but s. 66, under which this action was remitted to the county court, shows that the costs can only be allowed "according to the scale of costs for the time being in use in the county courts": see also s. 116. Therefore these costs are otherwise provided for within the meaning of s. 113: see *White* v. *Cohen*. (2) Secondly, if Order LIII., r. 17, by its terms applies to a remitted action, it is ultra vires as being inconsistent with s. 116 of the County Courts Act, 1888, the object of which is to prevent persons bringing actions in the High Court which ought to have been brought in the county court. It

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which could have been commenced in a county court, the following provisions shall apply: . . . . 2. If in an action founded on tort the plaintiff shall recover a sum less than ten pounds, he shall not be entitled to any costs of the action; and, if he shall recover a sum of ten pounds or upwards, but less than twenty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court. . . . ."

(1) County Court Rules, 1903 and 1914, Order LIII., r. 17: "Where the demand is unliquidated, and the plaintiff recovers less than the amount claimed, the judge may, if he thinks fit, order that his costs be taxed on the scale applicable to the amount claimed, or any intermediate scale, and that the court fees recoverable by the plaintiff shall be calculated on the amount claimed, or on any smaller amount."

(2) [1893] 1 Q. B. 580, 588.

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enacts that if in an action founded on tort the plaintiff recovers between 10*l.* and 20*l.* he shall only be entitled to such costs as he would have been entitled to if he had commenced his action in the county court, and if this action had been commenced in the county court the plaintiff would only have been entitled to costs on scale A.

[BRAY J. The judgment was for 15*l.* 15*s.* damages, and an order was made for the return of certain goods.]

The substantial claim was for damages and the goods were only of trifling amount.

Moyses (*Martin O'Connor* with him), for the plaintiff. The county court judge has a general discretionary power over costs: *Everall* v. *Brown*. (1)

[BRAY J. Sect. 116 does not seem to have been referred to in that case. It is said against you that s. 116 makes provision for such a case as this.]

Everall v. *Brown* (1) dealt generally with the judge's discretion as to costs. Order LIII., r. 17, contains nothing limiting its application.

[He was stopped.]

Horton-Smith in reply. In *Everall* v. *Brown* (1) the question was not whether costs could be given on a higher scale, but whether the judge had power to deprive the plaintiff of costs. Sect. 116 expressly limits the costs that may be given to a successful party where he recovers only a certain amount.

BRAY J., after stating the facts, continued: It is said on behalf of the defendant that Order LIII., r. 17, under which the county court judge acted, has no application to remitted actions, or that, if it purports to apply to them, it is ultra vires. On the face of it the rule seems to apply to all proceedings in the county court; it contains no words limiting its application to actions originally commenced in the county court, and, unless strong reasons can be shown to the contrary, it appears to me to apply to remitted actions as well as to those commenced in the county court. It is, however, contended that it is ultra vires because it is inconsistent with s. 116 of the County Courts Act, 1888, which, so far as it refers to actions of tort, provides that if in an action brought in the High Court which could have been commenced in a county court the plaintiff recovers

(1) [1905] 2 K. B. 196; [1906] 2 K. B. 884.

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a sum less than 10*l.* he shall not be entitled to any costs of the action, and if he recovers a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court. The contention for the defendant, as I understand it, is that this section takes away the discretion of the judge which he would otherwise have. Reliance was placed upon the case of *White* v. *Cohen*. (1) That case was decided on the first paragraph of s. 116, which relates to actions on contract; but from the judgments it appears that it equally applies to the second paragraph which relates to actions of tort. There the plaintiff brought an action in the High Court which could have been commenced in a county court, and which, after some proceedings in the High Court, was transferred to a county court under s. 65 of the County Courts Act, 1888, which relates to actions of contract. The plaintiff recovered less than 20*l.*, and by par. 1 of s. 116 he was entitled in that event to no costs. It was held that s. 116 is applicable to all actions brought in the High Court which might have been brought in the county court, whether tried in the High Court or ordered to be tried in the county court under s. 65, and that it applies to all costs of such actions, and not only to so much of them as in a case ordered to be tried in the county court have been incurred antecedently to such order, and that the plaintiff was therefore not entitled to any costs of the action. Lindley L.J. said: "We are of opinion, (1.) that the rules laid down in clauses 1 and 2 of s. 116, depriving a plaintiff of costs wholly or partially, are applicable to all actions brought in the High Court which might have been brought in the county court, whether tried in the High Court or ordered to be tried in the county court under s. 65, and (2.) that those rules apply to all the costs of such actions, and not only to so much of them as, in a case ordered to be tried in the county court, have been incurred antecedently to such order." We have therefore to see whether by s. 116 the county court judge is deprived of the discretion which he would otherwise have to say upon what scale the costs should be taxed. That point was, I think, decided in *Everall* v. *Brown*. (2) That case was under s. 65, which relates to actions of contract remitted to the county court. The present

(1) [1893] 1 Q. B. 580, 589.
(2) [1905] 2 K. B. 196; [1906] 2 K. B. 884.

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case is under s. 66; but in my opinion there is no substantial difference between those two sections. The head-note of the report of *Everall* v. *Brown* (1) is as follows: "Sect. 65 of the County Courts Act, 1888, which provides that in the case of remitted actions 'the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts,' does not take away the general discretionary power of the judge over the costs." That decision was affirmed by the Court of Appeal, where Vaughan Williams L.J., after consulting Romer and Cozens-Hardy L.JJ., said: "I think that we are all of opinion that the Divisional Court took the right view in *Aston Tube Works, Ld.* v. *Dumbell* (2), and that the Divisional Court in this case were right in adopting that view." That case decided that s. 65 does not take away the discretion of the judge under the words "shall be allowed according to the scale of costs for the time being in the county court." Sect. 116 was not referred to in that case, but the words of that section are not nearly so strong as those in s. 65. It seems to me, therefore, that *Everall* v. *Brown* (1) applies, and that s. 116 does not take away the discretion of the county court judge over the costs. If this action had been commenced in the county court it is clear that the judge could, in the exercise of his discretion, make the order he did, and I think he was equally entitled to make it notwithstanding that it was a remitted action. As to the point that s. 116 might not apply as in addition to the judgment for damages there was also an order for the return of goods, I express no opinion. The appeal must be dismissed.

AVORY J. I am of the same opinion. Order LIII., r. 17, is quite plain in its language, and, unless Mr. Horton-Smith could show that it was ultra vires, it seems to me impossible to contend that the county court judge had not a discretion to make the order appealed from. It is said that the rule is ultra vires as being inconsistent with par. 2 of s. 116. I am unable to see any inconsistency. Par. 2 says that in such a case as this the plaintiff, if he recovers a sum of 10*l.* and less than 20*l.*, shall not be entitled to more costs than he

(1) [1905] 2 K. B. 196; [1906] 2 K. B. 884.
(2) [1904] 1 K. B. 535.

would be entitled to if the action had been commenced in the county court. Upon that the question is, what costs would this plaintiff have been entitled to if the action had been commenced in the county court? To determine that question we have to look at ss. 66 and 113. Sect. 66, so far as material, says "the costs of the parties in respect of the proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts." Turning now to s. 113, we find that it provides that all the costs of any action, not otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action. There are certain scales of costs provided which are to apply in the absence of any special direction. It is admitted that if this case had been originally brought and tried in the county court the judge would have had a discretion under Order LIII., r. 17, to allow costs under scale B, and where s. 116 says that the party is to get such costs as he would have been entitled to if the action had been commenced in the county court, all the powers which the judge has over an action commenced and tried in the county court must, in my opinion, appertain to him when he is trying an action which has been remitted to the county court. *Everall* v. *Brown* (1) is a distinct authority for that, embodying as it does the judgment of the Court in *Aston Tube Works, Ld.* v. *Dumbell* (3), where Lord Alverstone C.J. said this: "It must, I think, be admitted that, if the action is an action in the county court, the judge has a discretion under s. 113. In my opinion, the action, when transferred to the county court, must be conducted in the same way and with the same consequences as if it had been commenced in that Court, and s. 113 applies." For these reasons I think the order of the county court judge was right.

Appeal dismissed.

Solicitor for plaintiff: *F. J. Stewart.*

Solicitor for defendant: *Alfred Docker.*

(1) [1905] 2 K. B. 196; [1906] 2 K B. 884.
(3) [1904] 1 K. B. 535, 543.

J. S. H.

1917
June 18;
July 9.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* THOMPSON.

Criminal Law—Evidence—Charge of Gross Indecency—Evidence of Possession of Powder Puffs and Indecent Photographs of Boys—Admissibility.

On the trial of a man on a charge of gross indecency the prosecution tendered evidence to prove that at the time the accused was carrying powder puffs and that in his rooms he had indecent photographs of nude boys. The defence was that the accused was not the man who committed the alleged offence, and he adduced evidence to prove an alibi:—

Held, that the evidence was admissible on the issue as to identity.

When objection is taken to the admissibility of evidence and the discussion of the objection in the presence of the jury may, in the opinion of the judge, be prejudicial to the prisoner, the proper course is to send the jury to their room and then to hear arguments in Court.

APPEAL from a conviction for gross indecency.

The appellant was indicted for acts of gross indecency with boys. His defence was that he was not the man, and he and other witnesses gave evidence of an alibi. The prosecution gave evidence that when he was arrested, three days after the alleged offence, powder puffs were found upon him and that indecent photographs of boys were found in his rooms. Objection was taken to this evidence, and, after hearing argument in his private room, the learned judge decided that the evidence was admissible. The accused appealed.

Gill, K.C., *Sir A. H. Bodkin*, and *Huntly Jenkins*, for the appellant.
Sir F. E. Smith, A.-G., and *Travers Humphreys*, for the Crown.

The judgment (1) of the COURT (Viscount Reading C.J., Darling and Avory JJ.) was delivered by

VISCOUNT READING C.J. The appellant was convicted of committing acts of gross indecency with two boys, and also of assaulting a police constable.

He appeals against the conviction on the grounds that (*a*) the

(1) The judgment was written.

judge wrongly admitted evidence which was not relevant to any of the offences charged in the indictment; and (*b*) the judge misdirected the jury by telling them that they might take this evidence into consideration. If the evidence was admissible, no complaint can be made of the direction to the jury; therefore the sole question in this appeal is whether this evidence was or was not admissible.

It was not disputed at the trial or on this appeal that the offences had been committed with the boys. The defence was that the appellant was not the person who committed them, and that he was elsewhere on the day and at the time in question.

For the prosecution there was a body of evidence identifying the appellant. One boy had seen him and spoken to him about a month before; both boys identified him as the man who on March 16 did the acts complained of, and gave them money and told them to meet him again on the Monday, March 19. Both boys went on the Monday to the appointed place, and saw the appellant, who was accompanied by two other persons. He told the boys he had business that day, and had no time, that they were to go away, and that the tall man was a policeman. He gave one boy two shillings to divide with the other. The police, who had been informed of the events of March 16, and were present to watch on March 19, then intervened. The boys thereupon told their story in the presence of the appellant, who made no reply, but struck the police officer and endeavoured to run away.

At the trial the appellant and other witnesses gave evidence on his behalf to establish an alibi on March 16. It was not in dispute that he saw and spoke to the boys on March 19. His story was that on this day he saw the boys following him, that he went into a shop and saw them again as he left it, and that he then told them to go away, gave them a coin out of his pocket without looking at it, and told them to buy soap and get their faces washed. At the police court he said he was not guilty and had never set eyes on the boys before his arrest.

During the course of the trial evidence was tendered by the prosecution to prove that, when the appellant was arrested on March 19, two powder puffs were found upon him, and that in a drawer in one of the rooms where he lived photographs of boys were found, including twelve separate photographs and ten pasted

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in an album of naked boys in various attitudes. Objection was raised to the admissibility of this evidence on the ground that none of these articles was connected with any charge on the indictment, and that the evidence could only serve to prove that the appellant was a person of evil character or disposition with regard to boys, and therefore was a person likely to commit the offence. After argument the learned judge admitted the evidence as tending to corroborate the evidence of identification of the appellant. The appellant by his evidence sought to explain that these photographs had come into his possession for the purpose of artistic study, that he had spent nine months in Italy studying sculpture, and had acquired most of the photographs there. Having regard to the verdict of the jury and the examination by the Court of the photographs, we must take it that these photographs are not of an innocent but are of an objectionable character.

There is no doubt as to the principles of law applicable to this case; they are well settled and in recent years have been frequently discussed and approved, and notably by the Judicial Committee of the Privy Council in *Makin* v. *Attorney-General for New South Wales* (1) and by the House of Lords in *Rex* v. *Ball.* (2) The general rule is that the evidence tendered must be relevant to the charge for which the accused is being tried. If the evidence merely proves, or tends to prove, that the accused is of such evil character or disposition that he is likely to have committed the offence charged against him, it is irrelevant and is inadmissible. If it tends to prove that the accused committed the crime charged against him, it is relevant and admissible, notwithstanding that incidentally it may also prove, or tend to prove, that the accused is a person of criminal or immoral character or disposition: *Reg.* v. *Ollis* (3), per Channell J.; *Perkins* v. *Jeffery.* (4) The difficulty lies in the application of this general rule to particular cases.

The question to be decided is whether, as contended by the prosecution, this evidence relating to the powder puffs and photographs tends to prove that the appellant was the person who committed the offences charged in the indictment, or whether, as contended by the defence, it merely shows that the appellant was

(1) [1894] A. C. 57.
(2) [1911] A. C. 47.
(3) [1900] 2 Q. B. 758, 781–782.
(4) [1915] 2 K. B. 702, 707.

a person whose character and disposition render it likely that he committed the offences. It is well known to those who have experience of these cases that persons who commit abominable crimes or acts of gross indecency with male persons make use of appliances such as powder and powder puffs and implements such as objectionable pictures for the purpose of carrying out their designs, and where the issue is whether the accused is the person who committed such acts evidence that there are found in his possession, either on his person or in the rooms occupied by him, at or about the time of the alleged offence, appliances or implements of that description is relevant to that issue, because it proves that he is a person in possession of the means by which such crimes are usually committed. It cannot, in our view, be doubted that, when upon a trial for burglary there is evidence connecting the accused with the commission of the crime, and the defence is that the accused was elsewhere at the material time and had no part in the crime, evidence of the possession of housebreaking implements, either upon him or at his house at about the time when the offence was perpetrated, is admissible. Just as upon a trial for procuring abortion, when there is evidence of a similar character against the accused, and a similar defence is raised, evidence is admissible to prove the possession by the accused of instruments or drugs which may be used for the purpose of procuring abortion, although no particular appliance, implement, instrument or drug can be identified as having been used on the particular occasion.

The powder puffs were actually found upon him when he was arrested on March 19. It is in evidence that he had made an appointment to meet the boys on that day for the purpose of repeating the acts of March 16 charged against him; if these are articles used by persons who commit these acts, the evidence is admissible, because it tends to show that the man upon whom the articles were found on March 19 was the same man who had met the boys on March 16. Ordinary men do not walk about carrying powder puffs in their pockets. The man who committed the acts of March 16 was a man who would be likely to carry powder puffs. The man who, according to the evidence, came to meet the boys on the 19th for the same purpose in fact carried powder puffs in his pocket. This evidence tends to prove that the man arrested

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on the 19th was the man who did the acts on the 16th, and is relevant. Of course, evidence would not necessarily be admissible of everything found in the possession of the accused. For instance, if a burglarious implement was found upon him, it could not be given in evidence against him upon a charge of committing acts of gross indecency; it would have no relevance to the issue, and would merely tend to show that he was a person of bad character. But upon a trial for burglary the finding of a burglarious implement upon him would clearly be evidence against him, and, a fortiori, when the only issue is whether he is the person who committed the burglary.

The evidence of the possession by the appellant of the photographs in a drawer in his room raises a more difficult problem. It is contended by the appellant that even if the Court rules that the evidence as to the powder puffs was admissible, there is no nexus between the finding of the photographs in a drawer in the appellant's room on March 19 and the commission of the offence on March 16. But the process of reasoning as to the powder puffs equally applies to the photographs and leads to the same conclusion. The issue is as to the identity of the appellant; the question is whether the possession of the photographs tends to connect the appellant with the commission of the offences charged.' Ordinary men do not keep indecent photographs of naked boys in their possession. Men who commit the offences charged do keep such photographs in their possession as part of the appliances or implements used in carrying out their designs. The man who did the acts on March 16 was a man who would be likely to have such photographs in his possession. The man arrested on the 19th in fact had such photographs in his possession at his rooms. This evidence is, in our judgment, relevant to the issue of identity, because it tends to show that the man arrested on the 19th was the man who committed the acts charged on March 16.

We are of opinion that the finding of the photographs did tend to prove that the appellant was the guilty person, and this appeal must therefore be dismissed.

Upon the hearing of this appeal it was stated at the Bar that the learned judge received counsel in the case at their request in his private room, and there heard the argument as to the admissi-

bility of this evidence, because it was thought so prejudicial to the defence that the jury should hear the discussion. After the argument was concluded, the Court resumed its sitting, and the objection to the admissibility was formally taken in open Court without discussion, and the learned judge ruled that it was admissible. No objection was taken upon this appeal to the procedure adopted, but in order to prevent any misapprehension as to this Court's view of the proper course to pursue in such circumstances, we are of opinion that whenever the judge in his discretion thinks it will unfairly prejudice the defence if the argument should be heard in the presence of the jury, he should direct the jury to retire to their room, and he should hear the argument in open Court so that it may appear on the shorthand note. This course should only be adopted when the judge in the exercise of his discretion thinks that the defence would be unfairly prejudiced, and the question cannot be argued in the abstract, as it frequently may be, when the evidence objected to appears on the depositions.

Appeal dismissed.

Solicitor for the Crown: *Director of Public Prosecutions.*
Solicitor for appellant: *Harry Wilson.*

J. H. W.

1917
July 23.

RONDEAU, LEGRAND & CO. *v.* MARKS. LOUIS MARKS, CLAIMANT.

[1913 R. 1660.]

Husband and Wife—Judgment against Wife—Agreement that all Wearing Apparel worn by Wife shall be Husband's absolute Property—Validity of Agreement.

A husband is bound to provide his wife with her necessary apparel, but he is not bound to give it to her. He can make the provision either by giving it to her in accordance with the common practice, or by lending it to her. Therefore an agreement between the husband and wife that all articles of wearing apparel used or worn by the wife are to be purchased by the husband in his own name and on his credit and are to be his absolute property, his wife having no right or title to them, except to wear them during his pleasure, is valid and enforceable as against judgment creditors of the wife. (1)

SPECIAL CASE stated by a Master of the High Court in an interpleader issue referred to the Master in respect of a claim by a husband to the property in his wife's clothing and articles of attire as against the judgment creditors on a judgment obtained by them against the wife on December 21, 1915. The claimant, Louis Marks (the husband of the judgment debtor), claimed all his wife's dresses, clothing, and wearing apparel on the ground that, in July, 1914, he made an agreement with his wife by which it was agreed that all dresses, articles of clothing, and wearing apparel which were to be used or worn by his wife were to be purchased by the claimant in his own name and on his credit, and that the dresses, articles of clothing, and wearing apparel when purchased were to be the absolute property of the claimant, and that he was to be entitled to dispose of them as and when and how he pleased, his wife having no right or title to them, except to wear them during his pleasure.

The Master found the agreement proved and that the dresses and wearing apparel were bought by the claimant and used by his wife on the terms contained in the agreement. It was contended by the judgment creditors that the agreement was in fraud of creditors; that it was contrary to public policy; that it was void for want of consideration; that it was invalid in law, and was not an agreement which the law would recognize as binding and effective.

(1) Affirmed in C. A., October 15, 1917.

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The question for the opinion of the Court was whether the agreement was valid in law.

The opinion of the Court and such order as the Court should think fit to make as to the costs of the special case and the hearing thereof were to be remitted to the Master so that he might finally dispose of the reference.

Schiller, K.C., and *J. D. Crawford*, for the judgment creditors. The agreement is void in law. To uphold it would be to place a married woman in a worse position than she was before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). The husband would be entitled at his caprice to take his wife's clothing off her back and (subject to any criminal liability) in any place she happened to be. It would destroy all protection a wife has. A wife has a legal right to clothes, lodging, and food, and if the husband does not provide them she has the right to pledge his credit in order to obtain them. If a husband can withdraw necessaries at his caprice he might forbid her to eat if he thought she was extravagant in her appetite. The agreement is an endeavour to avoid a legal obligation. It is a scheme to defraud creditors. Before the Married Women's Property Act, 1882, all the wife's chattels passed on marriage to the husband. *Harrison* v. *Grady* (1) shows that the husband has the right to say what style she shall live in, but she has the right to be provided with the wearing apparel necessary for that style. The whole tendency of legislation has been not to leave the wife at the mercy of the husband. The husband's legal obligation to provide his wife with necessaries involves the obligation to give them, not merely lend them, to her. She becomes the absolute owner of them. There was no consideration to support the agreement by the wife to give up that absolute ownership. [*Masson, Templier & Co.* v. *De Fries* (2); Comyns' Digest, vol. 2, p. 229; Lush on Husband and Wife, 3rd ed., p. 404; and Halsbury's Laws of England, vol. 15, par. 811, were referred to.]

D. M. Hogg, for the claimant. There is no legal obligation on the husband to give necessary apparel to the wife. He must provide her with it, but the clothes remain his property. At common law, as long as the husband lived the wife could not own clothes. But on

(1) (1865) 13 L. T. 369. (2) [1909] 2 K. B. 831.

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his death there arose a right in the wife to have as her own property her paraphernalia which during the husband's life had belonged to him. Under the Married Women's Property Act, 1882, the wife is capable of owning property. In the present case the only question is in whom was the property in the clothes at the time of the seizure. There is nothing in the Married Women's Property Act, 1882, which expresses or implies that the property in the wife's clothes is to be in her. The husband can make what arrangement he likes with her.

Schiller, K.C., in reply. *Masson, Templier & Co.* v. *De Fries* (1) shows that the husband is bound to give the wife her necessary clothing. If they live apart, clothes bought by her are clearly her separate property, whether they live apart by agreement or by decree of the Court. [*Read* v. *Legard* (2) was referred to.]

BAILHACHE J. Of the contentions on behalf of the judgment creditors the only substantial one is that the agreement found by the Master to have been made is void for want of consideration. If the agreement requires consideration to support it it cannot be enforced against the judgment creditors. As to consideration, when a wife is living with her husband he is bound to provide her with necessary apparel suitable for the station in life in which she lives and moves, her station in life being determined by that of the husband. If the husband is bound in law to make a gift to the wife of the necessary wearing apparel, any agreement between the husband and wife that the husband shall merely lend it to the wife would not be enforceable against the judgment creditors. Consideration would be necessary and none could be stated. But it is not the law that the husband is bound to give the wife her necessary wearing apparel. He is bound to provide it, but not to make her a gift of it. *Masson, Templier & Co.* v. *De Fries* (1) is a strong case to show that the husband discharges his duty to his wife by providing her with necessary wearing apparel. He can make the provision either by giving it to her in accordance with the common practice or by lending it to her. In normal cases the husband makes the provision by gift, and in the absence of evidence to the contrary the presumption in law is that the husband has given the apparel to the wife and that it therefore belongs to her. But there is no reason why the

(1) [1909] 2 K. B. 831. (2) (1851) 6 Ex. 636.

husband and wife should not enter into an agreement that the husband should not give, but merely lend, the wearing apparel to the wife. There is nothing to prevent the agreement being valid, and the question asked by the Master must be answered by saying that the agreement is valid and the goods belong to the husband and not to the wife.

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Bailhache J.

Case remitted to Master.

Solicitors for judgment creditors: *Cohen & Cohen.*
Solicitor for claimant: *W. B. Glasier.*

J. E. A.

CLAPHAM STEAMSHIP COMPANY, LIMITED (IN LIQUIDATION) *v.* NAAMLOOZE VENNOOTSCHAP HANDELS-EN TRANSPORT-MAATSCHAPPIJ VULCAAN OF ROTTERDAM AND OTHERS.

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July 19, 27.

[1916 C. 2630.]

Ship—Charterparty—Charterers Agents for Alien Enemies—Dissolution of Charterparty by Outbreak of War.

By a charterparty dated January 18, 1913, the plaintiffs, as the owners of the British steamship *Ferngarth*, agreed to let, and the Vulcaan Company agreed to hire, the *Ferngarth* for about five years. The Vulcaan Company was a Dutch company, but all its shares were held by Germans; it was managed by directors who were Germans resident in Holland who were subject to the control of a supervisory committee of Germans resident in Germany; and it existed for the purpose of furthering the operations of certain German companies. The charterparty provided that the vessel should only be employed in lawful trades, and it contained the following clause: "27. That in the event of war between the nation to whose flag the chartered steamer belongs and any European Power or any other Power operating or likely to operate in European waters, charterers and/or owners shall have the option of suspending this charter for the time during which hostilities are in progress." On the outbreak of war between Great Britain and Germany on August 4, 1914, the Vulcaan Company gave notice suspending the charterparty during the continuance of hostilities. The plaintiffs brought an action claiming a declaration that the charterparty was dissolved as being a contract with or on behalf of alien enemies:—

Held, that the charterparty was dissolved and not merely sus-

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pended by the outbreak of war, inasmuch as to keep it alive would on the one hand assure to alien enemies the use of the vessel at the end of the war, thus fortifying their commercial position during the war by enabling them to commit their own shipping without being hampered by the necessity of having it free when peace should be declared, and on the other hand it would prevent the plaintiffs from committing the vessel on pain of being liable in damages if on the conclusion of peace they should be unable to resume the fulfilment of their contract under the charterparty.

ACTION tried by Rowlatt J. as a commercial cause.

By a time charterparty dated January 18, 1913, between the plaintiffs, as owners of the British steamship *Ferngarth*, and the first defendants (hereinafter called the Vulcaan Company) as charterers, it was agreed that the plaintiffs should let and the Vulcaan Company should hire the steamship for about five years from delivery at a named rate of hire. The charterparty provided that the steamship should be employed in lawful trades, and it contained the following clause: "27. That in the event of war between the nation to whose flag the chartered steamer belongs and any European Power or any other Power operating or likely to operate in European waters, charterers and/or owners shall have the option of suspending this charter for the time during which hostilities are in progress. No voyage to be undertaken or goods or cargoes loaded that would involve risk of seizure, capture or penalty by rulers or Governments." The steamship was duly delivered to the Vulcaan Company, and on August 4, 1914, on the outbreak of war between Great Britain and Germany, she was discharging at Rotterdam under the charterparty. On August 5, 1914, the Vulcaan Company gave notice, under clause 27, suspending the charterparty during the continuance of hostilities. Thereafter the plaintiffs alleged that it became known to them that the Vulcaan Company was managed by two directors who were Germans resident in Holland, that they were subject to the control of a supervisory committee of Germans resident in Germany, that all the shares were held by Germans, and that the Vulcaan Company existed, and entered into the charterparty, for the purpose of furthering the operations of the German companies and firms who were the other defendants to the action. In those circumstances the plaintiffs contended that on the outbreak of war the charterparty became dissolved as

being a contract with or on behalf of alien enemies, and as involving, if kept alive, an unlawful contractual relationship and trading with alien enemies, and the maintenance during war and for an indefinite period of a contractual right and interest in favour of alien enemies. The plaintiffs therefore claimed a declaration that the charterparty became dissolved by the outbreak of war.

The defendants the Vulcaan Company said that they were a company duly constituted and incorporated under Dutch law, and as such, and not otherwise, entered into the charterparty; and the defendants counterclaimed a declaration that the charterparty was effective, existing and binding upon the plaintiffs.

Sir John Simon, K.C., R. A. Wright, and *C. R. Dunlop*, for the plaintiffs. The charterparty was automatically dissolved by the outbreak of war between Great Britain and Germany, for the Vulcaan Company, although registered as a Dutch company, is controlled by Germans and exists for the purpose of furthering their commercial interests. The continued existence of the charterparty became therefore illegal as involving intercourse with alien enemies: *Esposito* v. *Bowden* (1); *Zinc Corporation* v. *Hirsch*. (2) Clause 27 of the charterparty, under which the Vulcaan Company purported to suspend the contract during the continuance of hostilities, has no application in the event which has arisen, namely, war between this country and the country of those persons for whom the charterers are acting. The clause can only operate if no illegality intervenes to prevent the exercise of the option.

Greer, K.C., and *A. Neilson*, for the defendants. First, the Vulcaan Company is not a German company, but is a neutral company, for, although the shareholders are Germans and the directors are subject to the supervision of persons resident in Germany, a company is a distinct entity from the shareholders who compose it. No doubt views were expressed in the House of Lords in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (3) that the Court may look behind the company as an entity and see who control it, but the actual decision was merely that the action failed inasmuch as it had been instituted without authority from the company.

(1) (1857) 7 E. & B. 763. (2) [1916] 1 K. B. 541.
(3) [1916] 2 A. C. 307.

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Secondly, there is nothing to prevent the charterparty being performed in a lawful manner, even during the war, namely, by trading with neutral countries. There is an express stipulation that the steamship is only to be employed in lawful trades, and, moreover, it is open to the defendants to use her after the war. The force of the declaration of war, as was said by Willes J. in *Esposito* v. *Bowden* (1), was equal to that of an Act of Parliament prohibiting intercourse with alien enemies; that involves that war only suspends, and does not dissolve, the charterparty. Moreover, as the parties have expressly provided as to what may happen in the event of hostilities, no condition can be implied that the contract should come to an end in the event of war. The mere interruption of performance does not determine the contract: *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2)

R. A. Wright in reply. It is said for the defendants that the parties have by clause 27 made provision for suspension of the contract during the continuance of hostilities; but the intention of the parties in this respect is quite immaterial in view of the fact that performance of the contract became illegal on the outbreak of war: *Esposito* v. *Bowden* (1); *Janson* v. *Driefontein Consolidated Mines* (3); *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (4) As to the status of the Vulcaan Company, it must be deemed to be an alien enemy. The rules about the status of companies applicable in time of peace do not necessarily apply in time of war, and the material fact to be ascertained is, who are the persons in control of the company? See observations of Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (5); see also *The Polzeath* (6) and *The St. Tudno.* (7) In this case there can be no doubt that the Vulcaan Company is under German control.

Cur. adv. vult.

July 27. ROWLATT J. read the following judgment:—In this case the plaintiffs, who are the owners of the steamship *Ferngarth*,

(1) 7 E. & B. 763, 781.
(2) [1916] 2 A. C. 397.
(3) [1902] A. C. 484, 509.
(4) [1915] 2 K. B. 379; [1916] 1 K. B. 495.
(5) [1916] 2 A. C. 307, 345.
(6) [1916] P. 241.
(7) [1916] P. 291.

seek a declaration that a charterparty by which their steamer was chartered to the first defendants (whom I will call the Vulcaan Company) for a period of about five years commencing in February, 1913, was put an end to by the outbreak of war. The Vulcaan Company is a Dutch company, but all the shares are held by the three companies who are the other defendants and are German companies. The Vulcaan Company is managed by two directors who are Germans resident in Holland, but they are subject to the control of a supervisory committee of Germans resident in Germany. The Vulcaan Company clearly only exists for the purpose of furthering the operations of the three German companies, and is in fact nothing but a branch establishment organized under the convenient machinery of a subsidiary company. The charterparty immediately in question had for its object the provision of tonnage for the purposes of the business of the German companies.

Under these circumstances the plaintiffs contend, first, that the Vulcaan Company is to be regarded simply as a German, that is to say an enemy, company, and, secondly, that therefore the outbreak of war necessarily put an end to the contract. I understood the learned counsel to contend as a general proposition universally applicable that the outbreak of war made the maintenance of any contractual relation with the defendants illegal even with interrupted performance, and that no question of the effect of the interruption upon the supposed intention of the parties could arise. I do not think it necessary to decide whether the effect of war can be put as high as this. There are formidable difficulties in the way. It was conceded that a contract under which nothing remained to be done but to pay a sum of money would not be put an end to by war, though the remedy by action for its recovery would be postponed till the state of war came to an end. In such a case the obligation would remain during the war, but temporarily unenforceable. It is nothing to the purpose to say that that would be the case if a cause of action accrued. I apprehend that the position would be the same if the payment was subject to a period of credit unexpired at the outbreak of war. In any case, to say that the cause of action remains involves saying that the obligation remains. And there may be other cases where it would be proper to hold that the obligation may remain though performance during the war becomes

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illegal. The question is whether this is such a contract. Nor do I think it necessary to decide whether the effect of the decision in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1) is to require me to hold on the facts of this case that the Vulcaan Company is an enemy company. It seems to me enough to say that the effect of this contract is to oblige British subjects to render services for the benefit of enemies.

Mr. Greer, for the defendants, contended that this charter only provided for lawful voyages, and that it could therefore be observed during the war without performing services for the enemy. But any voyage under this charter would be for the benefit of enemies whether or not the goods were carried to an enemy country. There is no room for a lawful voyage. That being so, the charterparty is at least interrupted for the period of the war, and the question is whether it is still in existence for any purpose. This question, Mr. Greer contended, ought to be answered by applying the test formulated by Lord Loreburn in the *Tamplin Case* (2), and that I ought therefore to ask myself whether the contract was impliedly conditional on the absence of such an interruption as that with which the parties are confronted. He next insisted that no such condition could be implied because the parties had contemplated the risk of war and by clause 27 had provided for the case by giving an option to either party to suspend the charterparty in such an event.

It is clear that the first step in this argument must be to make good the proposition that the illegality with which this charterparty was affected by the outbreak of war was rigidly confined to its performance during the war and did not taint the maintenance of the obligation during the war to resume such performance at its close. If this is so, Mr. Greer may be justified in saying it is a mere interruption like that in the *Tamplin Case* (2), where the enforced discontinuance of the chartered services in obedience to the requisition of the British Government could not conceivably import any illegality in looking to their resumption. Further, if this view is correct, there is much to be said for Mr. Greer's next step, namely, that having regard to the *Tamplin Case* (2), the interruption is not such as to put an end to the charter even without clause 27, and much less with it. On the other hand, if the contract is such that the

(1) [1916] 2 A. C. 307. (2) [1916] 2 A. C. 397.

maintenance during the war of the obligation to resume performance on the return of peace is illegal, then there is no question of any implied condition on the principle expounded in the *Tamplin Case*. (1) The whole contract becomes illegal.

Upon this crucial point Mr. Greer laid stress on what was said by Willes J. in *Esposito* v. *Bowden* (2), namely, that the outbreak of war had the effect of an Act of Parliament making illegal intercourse with the enemy during its continuance; and the reasoning in the same judgment makes it appear that the learned judge was treating the performance of the contract as illegal only as to part of its possible scope, and was inquiring whether that made the whole voidable. The position in that case was, however, very different from that in the present case. The charterparty was not with, or for the benefit of, an enemy, and performance was illegal only if and so far as it would consist in shipping goods exported by the enemy. Here the charterparty is for the benefit of the enemy, and the view I take is that its nature was such that the outbreak of war made it illegal in toto, even though suspended or postponed in performance. If the contract still subsists the position created by the outbreak of war acting upon the contractual engagements of the parties is to withdraw the ship for the duration of the war while assuring the benefit of her services to the enemy at the moment of its conclusion. Now, in considering this position, I must not let my outlook be confined to the circumstances of the present moment, or of the present war as it has developed in fact. I must look at the question as a general one to be answered as at the moment of the outbreak of war. It seems to me that if at the moment when war breaks out the enemy is entitled to retain his assurance of tonnage to be available at the end of the war his commercial position is fortified even during the war. He is enabled, by the prospect of shipping facilities which he has, to keep together his connection with neutral or enemy merchants overseas, and even (if he likes to speculate on the war being short or if he can obtain contracts with conditions protecting him if it should be long) to enter de praesenti into new contracts to be performed when peace arrives. His ability to do these things at least for a time helps to drive his adversary to the necessity of a long war. In any case it

(1) [1916] 2 A. C. 397. (2) 7 E. & B. 763, 781, 792.

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enables the enemy fully to commit his own shipping for the purposes of his trade during the war without being hampered by the necessity of having it free at the end, for then he has the right to the services of the shipping of his adversary. On the other hand, the adversary must not commit his shipping on pain of being liable for damages if peace should find him unable to resume the fulfilment of his contract with the enemy charterer. I do not think that the law will allow a British subject to remain in this relation with an enemy. I do not base my decision on the ground that the maintenance of the charterparty in a state of suspension during the war will benefit the enemy after the war. That may or may not of itself make it illegal. What I say is that it supports the enemy during the war.

In deciding on these grounds that this charterparty was put an end to by the outbreak of war I am applying what I conceive to be the principle which lies at the very root of the rule which makes trading with the enemy illegal, and I think I am applying it upon lines approved by the Court of Appeal in *Zinc Corporation* v. *Hirsch* (1), though the special features of the two cases are, of course, very different, and perhaps I am carrying the application a little further.

Since the above was written I have seen a report of the decision of the Court of Appeal in *Rio Tinto Co.* v. *Eitel Bieber & Co.* (2) That decision, like that in the *Zinc Corporation Case* (1), was based primarily upon the circumstance that the contract involved actual intercourse with the enemy during the war. So far, however, as I am able to judge from the report which I have seen, at least one of the Lords Justices was of opinion that that case fell also within the principle which I think is applicable here.

For these reasons I make the declaration asked for by the plaintiffs and they must have the costs of the action.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Lowless & Co., for Ingledew & Fenwick, Newcastle-on-Tyne.*

Solicitors for defendants : *Pritchard & Sons.*

(1) [1916] 1 K. B. 541. (2) (1917) 33 Times L. R. 537.

J. S. H.

LIPTON, LIMITED *v.* FORD.

[1916 L. 1299.]

1917
May 15, 16 ;
June 8, 21.

Emergency Legislation—Defence of the Realm Regulations—Validity—Contract—Requisition by Army Council—Interference with Fulfilment of Contract—Defence of the Realm Regulations, reg. 2B—*Defence of the Realm Consolidation Act*, 1914 (5 *Geo.* 5, *c.* 8), *s.* 1, *sub-s.* 1—*Defence of the Realm (Amendment), No.* 2, *Act*, 1915 (5 *& 6 Geo.* 5, *c.* 37), *s.* 1, *sub-s.* 2.

Reg. 2B of the Defence of the Realm Regulations (in the form in which it was on August 17, 1916, and still is with certain alterations not material to this report), which gives power to the Army Council to take possession of any food and any articles required for the production thereof, is within the power given to His Majesty in Council by s. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914, to make regulations for the purpose of securing the public safety and defence of the realm, and is therefore not ultra vires.

An exercise of the powers under the regulation for the purpose of procuring a substantial quantity of a necessary supply (e.g., raspberries) for the use of the troops is an exercise of the powers for securing the public safety and defence of the realm.

On August 17, 1916, the Army Council delivered to a firm of raspberry growers a requisition requiring them to place at the disposal of the Army Council a quantity of raspberries and to deliver the same to such persons and in such amounts as the Director of Army Contracts might direct. The raspberries requisitioned were in substance gathered after the date of the requisition :—

Held, that reg. 2B contemplates the separate existence as chattels of the articles to be taken possession of and does not give the right to take possession of growing crops ; but that as the requisition, upon its true construction, was a notice of intention to take possession of the raspberries when gathered, it was within the powers given by reg. 2B.

ACTION tried in the Commercial Court before Atkin J. without a jury.

The action was brought to recover damages from the defendant for breach of a contract to deliver 41 tons 6 cwts. 1 qr. 7 lbs. of Blairgowrie raspberries—the undelivered balance of a total quantity of 50 tons at 19*l.* a ton, under a contract contained in bought and sold notes dated July 27, 1916.

The defendant alleged that he was not a party to the contract,

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and, alternatively, that under s. 1, sub-s. 2, of the Defence of the Realm (Amendment), No. 2, Act, 1915, he was excused in whole or in part from performing it by reason of the necessity for complying with a requisition made on him on August 17, 1916, by the Army Council for the supply to them of all the raspberries then at his disposal.

The ground upon which he based his claim to be wholly excused from performing the contract was that he intended to deliver all his available raspberries to private buyers first, trusting that the Government would accept a substitute.

The following statement of the facts is taken from the judgment of the learned judge :—

" The facts appear to be that the defendant is a fruit salesman carrying on business in London, and has for some years acted as the sole agent in London of a firm of Keay & Hodge, who are large growers of raspberries in the Blairgowrie district. The plaintiffs had done business with the defendant on a previous occasion, and in July, 1916, agreed with the defendant to purchase from him 50 tons of Blairgowrie raspberries at 19*l.* a ton. The contract was reduced into writing, and is contained in bought and sold notes bearing date July 27, 1916. The sold note which I will read is in these terms : ' Mr. Walter Ford, Borough Market, July 27, 1916. We have sold to Messrs. Lipton, Limited, Rouel Road, Bermondsey, fifty tons Scotch raspberries (Blairgowrie)—senders' barrels. Terms at 19*l.* per ton cash to be paid each week for all goods delivered during previous week. Special conditions : Fruit to be gathered immediately before despatch. This contract has been placed subject to your permitting us the privilege of transit for 100 tons of raspberries from Blairgowrie district by your special train to the extent of about 10 tons daily in addition to your own consignments. Carriage free on rail Blairgowrie. Delivery, not to exceed six tons per day. No fruit to be railed on Fridays.' That sold note is signed by the defendant. The terms were arranged verbally on the telephone on July 26 between Mr. Spence, the plaintiffs' representative, and Mr. Ford. Mr. Spence was aware, as the fact is, that Mr. Hodge, of Keay & Hodge, was in Mr. Ford's office at this time, and various terms of the contract were verbally settled only after reference to Mr. Hodge made with Mr. Spence's knowledge. The

special train referred to in the contract was provided by Messrs. Keay & Hodge.

"It happened that the year 1916 was a bad year for raspberries in the Blairgowrie district owing to drought in that part of the country in July and early August. The result was that Messrs. Keay & Hodge, who had sold in advance 1276 tons of raspberries, only produced altogether 913 tons, and could procure no more from other Blairgowrie growers. Of the 1276 tons 363 had been sold to buyers on behalf of the Government. Towards the middle of August Mr. Ford and Messrs. Keay & Hodge were being pressed by their buyers. Of the 50 tons due to them Messrs. Lipton by August 14 only had been given delivery of 8 tons 13 cwts. 2 qrs. 21 lbs. The Government buyers had only received 71 tons. Some time before August 17 Mr. Hodge took the opportunity of intimating to the representatives of the Government buyers that if the Government desired to ensure delivery they would have to requisition the raspberries. Accordingly on August 17 the Army Council delivered to Messrs. Keay & Hodge the following requisition: 'In pursuance of the powers conferred upon the Army Council by the Defence of the Realm Consolidation Act, 1914, and the Defence of the Realm (Amendment), No. 2, Act, 1915, and the regulations made thereunder, and of all other powers thereunto them enabling, the Army Council hereby require Messrs. Keay & Hodge, fruit growers, Blairgowrie, to place at the disposal of the Army Council 363 tons of raspberries and to deliver the same to such persons and in such quantities as the Director of Army Contracts may direct. By order of the Army Council. N. F. Wintons, Director of Army Contracts.' In pursuance of this document Messrs. Keay & Hodge delivered to the Government buyers all the raspberries that came to their hands after that date, amounting to 242 tons. They delivered none to any of the private buyers, including the plaintiffs, who are therefore 41 tons 6 cwts. 1 qr. 7 lbs. short on the contract of July 27."

By the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1, sub-s. 1: "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council

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and of the members of His Majesty's forces and other persons acting in his behalf; . . . ."

By the Defence of the Realm (Amendment), No. 2, Act, 1915 (5 Geo. 5, c. 37), s. 1, sub-s. 2: "It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference."

Reg. 2B of the Defence of the Realm Regulations (in the form in which it was on August 17, 1916, the date of the requisition) (1) is as follows: "It shall be lawful for the Admiralty or Army Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof. If, after the Admiralty or Army Council or the Minister of Munitions have issued a notice that they have taken or intend to take possession of any war material, food, forage, stores or article in pursuance of this regulation, any person having control of any such material, food, forage, stores or article, sells, removes, or secretes it, without the consent of the Admiralty or Army Council or the Minister of Munitions, he shall be guilty of an offence against these regulations."

Langdon, K.C., and *J. D. Crawford*, for the plaintiffs. The defendant entered into the contract personally, and evidence is only admissible for the purpose of charging Keay & Hodge as principals, not for the purpose of enabling the defendant to escape liability.

Reg. 2B of the Defence of the Realm Regulations is outside the power of His Majesty in Council to make regulations given by s. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914. The only power given is to make regulations for the purpose of securing the safety and defence of the realm. Reg. 2B is not within that category. It is ultra vires, because it is absolute in its terms

(1) See Defence of the Realm Manual revised to July 28, 1916, p. 18.

and is not limited to the purpose of securing the safety and defence of the realm. Having regard to s. 1, sub-s. 3, which specially enacts that it shall be lawful for the Admiralty or Army Council to require that the whole or any part of the output of any factory, &c., shall be placed at their disposal, and that regulations may be made accordingly, it appears that the Legislature considered that taking possession of chattels required special authority and was not within the powers conferred by s. 1, sub-s. 1.

Power is given to take possession of stores under reg. 2B only when it is necessary to do so for the purpose of securing public safety or the defence of the realm, and the obtaining a supply of raspberries cannot be said to be necessary for that purpose.

The regulation does not give power to the Army Council to take growing raspberries. Express power is given by reg. 2C to enter upon land for the purpose of felling and removing trees, and if it had been intended to give power to take growing crops express language to that effect would have been used. Growing raspberries are neither war material, food, forage nor stores, nor are they fructus naturales. They are therefore not within reg. 2B, and the requisition is bad upon that ground.

Sir F. E. Smith, *A.-G.*, and *Branson*, as amici curiae. It is true that powers conferred by regulations made under the Defence of the Realm Consolidation Act, 1914, must, in order to be valid, be for the public safety or for the defence of the realm. The powers conferred upon those responsible for national security are of the widest possible character: *Rex* v. *Halliday*. (1) It is impossible for the authorities to produce evidence in every case that a requisition is for the purpose of securing public safety or the defence of the realm. Raspberries are food or articles required for the production of food within the meaning of reg. 2B. Jam is food, and raspberries, which are necessary for the manufacture of raspberry jam, are within the words "an article required for the production of food." It is clear that the Army Council has power under reg. 2B to requisition wheat required for the production of bread a fortnight before it is ripe. Reg. 2B empowers the Army Council to serve a notice of intention to take possession of articles at a future date, and thereafter the owner is unable to deal with them.

(1) [1917] A. C. 260.

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Roche, K.C., and *C. R. Dunlop*, for the defendant. The defendant is not liable. He was to the knowledge of the plaintiffs merely the agent for Keay & Hodge, although the contract was made in his own name. The reference in the contract to " your special train," which was in fact supplied by Keay & Hodge, shows that the defendants' name must be read as that of Keay & Hodge.

Keay & Hodge were prevented from carrying out the contract by the necessity of complying with the requisition, and the defendant is therefore protected from liability by s. 1, sub-s. 2, of the Defence of the Realm (Amendment), No. 2, Act, 1915. The requisition served upon Keay & Hodge was issued on behalf of the Army Council, and was therefore prima facie issued by the proper authority. It is not the duty of a person who receives a requisition to test its validity, nor has he to decide whether it is necessary for the defence of the realm in order to obtain the protection of the statute: *In re a Petition of Right.* (1) Growing raspberries are articles required for the production of food within reg. 2B, and the requisition, even if it did not come within the first part, was valid under the second part of the regulation.

Langdon, K.C., in reply. The power given by reg. 2B to take possession of a growing article only arises when the article is severed. The latter portion of reg. 2B does not give any power to serve a notice of an intention to take possession at a subsequent time.

Cur. adv. vult.

June 21. The following judgment was read by

ATKIN J.:—In this case the plaintiffs claim damages from the defendant for the breach of a contract to deliver 41 tons 6 cwts. 1 qr. 7 lbs. of Blairgowrie raspberries, being the balance remaining undelivered of a total quantity of 50 tons, the subject of a contract in writing dated July 27, 1916. The defendant says that he was not a party to the contract, and alternatively that he is excused in whole or in part from performing the contract by reason of the necessity of complying with a requisition made upon August 17, 1916, by the Army Council for the supply to them of all the rasp-

(1) [1915] 3 K. B. 649, 666.

berries then at his disposal. [The learned judge having stated the facts, continued :]

I am satisfied that Mr. Spence was aware that in making this contract Mr. Ford was acting on behalf of Messrs. Keay & Hodge, and Mr. Spence would expect to get Messrs. Keay & Hodge's raspberries, though there was nothing in the contract to limit the raspberries to raspberries of Messrs. Keay & Hodge's own growing. Nevertheless I see no reason for supposing that Mr. Ford is not a contracting party. The written contract appears to be made with him, and in my judgment evidence outside the contract is only admissible to make Messrs. Keay & Hodge liable as principals but not to discharge Mr. Ford. It was argued that the reference in the contract to "your permitting us the privilege of transit by your special train" showed that the written contract must be construed as if Walter Ford meant Keay & Hodge, by whom in fact the special train referred to was provided. I see nothing unnatural in a contract made with a salesman personally in a description of facilities promised by his known principals as his facilities, and I am satisfied that in fact both parties intended Mr. Ford to be a contracting party. I need say no more as to the first ground of defence.

But the defendant says that he is protected from having to pay damages by reason of s. 1, sub-s. 2, of the Defence of the Realm (Amendment), No. 2, Act, 1915. [The learned judge read the sub-section, and continued :] The defendant says that but for the requisition he intended to deliver all his available raspberries to private buyers first, trusting that the Government would accept a substitute, and that he is therefore excused to the whole extent of the plaintiffs' claim. I may deal with this point shortly by saying that I do not accept the contention that such was the defendant's intention. I find references to such an intention in the correspondence passing between Messrs. Keay & Hodge about the time of the requisition. It was, however, not acted upon, and, comparing the dates of the correspondence with the date at which requisition must have been first discussed with the Government buyers, I am not satisfied that it was ever intended to be acted upon.

The plaintiffs, on the other hand, admit that if there was a valid requirement within the section the fulfilment of the contract was to

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some extent interfered with by the necessity of complying with it, but they say no valid requirement was in fact made. On this latter point I adjourned the case in order that the Law Officers' views might be ascertained, and I had the advantage of hearing argument on the point from the Attorney-General as amicus curiae. The regulation under which the notice of August 17 was given was reg. 2B of the Defence of the Realm Regulations. For the purpose of this case it appears to me that I must construe the regulation in the form in which it appeared at the date in question, namely, August 17, 1916. Additions have been made since. The form to be considered is as follows: [The learned judge, having read the regulation, continued:]

The first objection made was that the regulation did not purport to limit the power of the Admiralty or Army Council or Minister of Munitions to take possession to cases where it was necessary for the public safety or defence of the realm, as in the case of the powers given to the competent naval or military authority under reg. 2, and that the regulation was not well made under the regulation-making powers given by s. 1, sub-s. 1, of the Defence of the Realm Act, 1914. In any case, it was further contended that taking possession of a crop of raspberries could not be necessary for the public safety or defence of the realm. I do not think those arguments well founded. I think that all that I have to see is whether the regulation is one that is reasonably capable of being a regulation for securing the public safety and defence of the realm. If it is, I do not think the Court is entitled to question the discretion of the Executive, to whom Parliament has entrusted powers in such wide terms. I see no reason why a regulation giving powers in these general terms to important departments should not be considered advisable for securing the defence of the realm. I doubt whether I have to further consider whether, in exercising powers given in general terms by the regulation, the Army Council or other authority are in fact acting for the public safety, though I understood the Attorney-General to concede that an exercise of the power under the regulation would not be valid unless it was in fact for the public safety. I am inclined to think that the regulation meant to give an unrestricted power to the bodies named, trusting them to exercise the powers in the public interest and leaving the subject who

thought he was oppressed to his proper remedies for an oppressive use by the Executive of their legal powers. But in any case I am satisfied from the evidence that an exercise of the powers under the regulation, as in this case, for the purpose of procuring a substantial quantity of a necessary supply for the use of the troops was an exercise of the powers for securing the safety of the public and the defence of the realm.

It was further argued that the notice in question was bad because it purported to take possession of the raspberries as a growing crop and the regulation gave no such power. I had no precise evidence as to how much of the 242 tons delivered to the Government after the notice of August 17 had in fact been gathered at that date, but the argument proceeded on the assumption that the quantity mentioned was all gathered after that date, and in substance I have no doubt that is correct. If the notice was a notice that the Army Council were at that date taking possession of raspberries then growing, I think the plaintiffs' contention would be well founded. It appears to me that the regulation contemplates the separate existence as chattels of the material, food, forage, &c., to be taken possession of. I do not think it contemplates that the Army Council would take possession of fields of corn in the blade or fields of roots while undeveloped, or of any growing crops, whether the land in which they are growing requires further tillage to make the crop productive or the crop requires thinning, spraying, or other attention, or whether it is only necessary to enter the land to gather the crops. None of the powers of entry, tillage, and gathering are given by the regulation which I should expect to find in such a case. Nor do I think it likely that it was contemplated that either the Admiralty or Army Council or Minister of Munitions should find the labour which might be necessary if growing crops were taken possession of, and I notice that in reg. 2c express power is given to take possession of trees, with express powers of entering, felling, and storing. This seems to me to make it unlikely that reg. 2B was intended to have the larger meaning contended for. I think, however, that the true view of the notice of August 17 was that it was a notice of intention to take possession of the raspberries when gathered. I see no reason why such a notice should not be given in respect of growing crops, applicable to possession

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Atkin J.

when the crops are severed, and I gather that this is the procedure which has been followed in reference to hay. I think the procedure is valid.

Under these circumstances the latter part of reg. 2B applies. Messrs. Keay & Hodge after such a notice could not dispose of the crop when gathered except to the Government, and I think that the fulfilment of their contract was interfered with by the necessity of complying with a requirement of the Army Council within the meaning of s. 1, sub-s. 2, of the Defence of the Realm (Amendment), No. 2, Act, 1915.

The only question that remains is to what extent was the contract interfered with. I think the reasonable view to take is that if the Army Council had not intervened the seller would have distributed what raspberries he had after that date in equal proportions towards satisfaction of the amounts undelivered. For this purpose it is agreed that the defendant and Messrs. Keay & Hodge must be taken as one.

The learned judge then carefully analysed the figures given in evidence, and came to the conclusion that the defendant was excused from delivering about 16 tons 12 cwts., leaving about 24 tons 15 cwts. undelivered without legal excuse, and that the right amount to allow the plaintiffs would be 15*l.* per ton. He accordingly gave judgment for the plaintiffs for 371*l.* 5*s.* with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Neve, Beck & Kirby.*
Solicitor for defendant: *C. J. Parker.*

J. E. A.

W. MILLAR & CO., LIMITED *v.* OWNERS OF SS. FREDEN.

1917
June 29;
July 2.

[1916 W. 2018.]

Shipping—Charterparty—Guarantee by Shipowner that Ship's "dead-weight capacity" is specified Number of Tons—Meaning of Expression—Cargo of Maize—Ship capable of lifting specified Number of Tons, but Cubic Capacity insufficient to take on Board that Weight of Maize—Whether Breach of Guarantee by Shipowner.

A printed form of charterparty provided that the ship should load and the charterers provide at Durban a full and complete cargo of maize (the words "wheat and/or flour and/or other lawful merchandise" which were in the printed form being struck out). The ship was then to proceed and discharge at one of a number of ports as ordered. The freight was to be payable at and after rates which varied according to the port of discharge. Then followed the clause: "The owners guarantee the ship's dead-weight capacity to be 3200 tons and freight to be paid on this quantity." That clause was substituted for a printed clause which made freight payable per ton of wheat and/or flour delivered, or, if other cargo was shipped, on a full cargo of wheat and/or flour. The effect of the alteration was to make the charterparty one at a lump sum freight, varying, however, with the port of discharge. The ship in fact had a lifting capacity of 3200 tons, but she had not cubic capacity to take on board maize of that weight:—

Held, that the primary meaning of the phrase "ship's dead-weight capacity" was not her capacity to carry tons of maize, but her abstract lifting capacity, and that the mere fact that maize was mentioned as the cargo to be carried in the earlier part of the charterparty did not change the meaning of the phrase from a designation of the ship's lifting capacity in the abstract to a designation of something quite different, namely, of her combined lifting and cubic capacity applied to the ratio of bulk to weight existing in maize.

Mackill v. *Wright* (1888) 14 App. Cas. 106 distinguished.

ACTION in the commercial list tried before Rowlatt J. without a jury.

The plaintiffs, Messrs. W. Millar & Co., Limited, who were the charterers of the steamer *Freden*, claimed damages for breach of a charterparty dated December 23, 1915. The charterparty was contained in a printed form headed "Adelaide Charter Party," certain words in the printed form being struck out as indicated below, and

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other words introduced by written interlineations as indicated below in italics. The printed form so modified was (as far as material) as follows :—

" Adelaide Charter Party.

For Grain Cargoes.

Approved September, 1891, by Adelaide Chamber of Commerce Incorporated.

London, 23rd December 1915.

1. Charterers. It is this day mutually agreed between A/S. ' Freden ' for and on behalf of the Owners of the good Ship or Vessel called the ' Freden ' (Norwegian Flag) classed 100A1. of the measurement of 1920 tons *net regr.*

∧ or thereabouts, now about due January at Durban with a cargo of nitrate whereof is Master, of the one part, and Messrs. Wm. Millar & Co. Limtd. of London Charterers, of the other part.

2. Port of loading. That the said Ship being tight, staunch, strong, and in every way fitted for the voyage, shall, with all convenient speed, proceed to Durban after discharge of her nitrate cargo

3. Cargo. or so near thereunto as she may safely get, and there load at such safe dock or wharf and/or anchorage as Charterers may direct, as customary from Charterers' Agents, a full and complete cargo of *maize* ~~Wheat and/or Flour~~ ∧ in bags, ~~and/or other lawful merchandise~~ which the said Charterers bind themselves to provide not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture ; and being so loaded, shall forthwith proceed as ordered by Charterers, to any one safe port in the United

4. Port of discharge. Kingdom . . . . calling at Queenstown, Falmouth, or Plymouth, for orders to discharge . . . .

5. Freight. Freight being payable at and after the rate of

(67/6) Sixty-seven Shillings and Sixpence sterling, if ordered to a ~~direct~~ port in the United Kingdom on the west or south coast not east of Southampton, including west coast of Ireland, Glasgow and Manchester and its Canal

(67/6) Sixty-seven Shillings and Sixpence sterling, if ordered to a ~~direct~~ port on the ~~Continent, as above~~ east coast of Ireland.

to Bristol

(69/6) Sixty-nine Shillings and Sixpence sterling, if ordered ∧ *or to a Mersey port, including Liverpool but Manchester and its* ~~from port of call to a port in the United Kingdom.~~ *Canal excluded*

(71/-) Seventy-one Shillings sterling, if ordered from port of call to *London* *The owners guarantee the ship's* ~~a port on the Continent, as above all per ton of 2240 lbs. the net~~ *dead-weight capacity to be* 3200 *tons and freight to be paid on this* ~~weight delivered at King's Beam for Wheat and/or Flour, if other~~ *quantity.*

~~Cargo is shipped, the total freight to be equal to freight on a full cargo of Wheat and/or Flour.~~

The said freight, less advances, if any, to be paid on unloading and right delivery of the cargo, in cash."

The ship in fact had a lifting capacity of 3200 tons, but she had only cubic capacity to take on board 3081 tons 560 lbs. of maize, i.e., 118 tons 1680 lbs. less than 3200 tons, and the plaintiffs claimed 400*l.* 15*s.* 8*d.*, the sum which represented the freight they had paid in respect of the 118 tons 1680 lbs. at 67*s.* 6*d.* per ton, as damages for breach of the guarantee contained in clause 5.

The defendants (the owners) contended that freight was to be paid on the dead-weight lifting capacity of the ship in the abstract sense, taken and guaranteed to be 3200 tons, and that the guarantee had no reference to the kind of cargo carried.

It was agreed that if she had been able to load more than 3200 tons the charterers would have been entitled to ship it without paying more freight, and the owners would have been entitled to call upon them to do so, though the damages, if they refused, would possibly have been nominal.

There was a claim for commission, which was admitted in the defence, and the money paid as if brought into Court.

MacKinnon, K.C., and *R. A. Wright*, for the plaintiffs. By the guarantee contained in clause 5 of the charterparty the defendants guaranteed that the ship would carry 3200 tons of the cargo to be carried, i.e., maize. As she could not carry that weight of maize the defendants have committed a breach of the guarantee: *Mackill*

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v. *Wright.* (1) The judgments of Lord Halsbury L.C. and Lord Macnaghten cover the present case, and the plaintiffs are therefore entitled to the damages they claim. In *Carnegie* v. *Conner* (2) there was an abnormal cargo. [*Potter* v. *New Zealand Shipping Co.* (3) was also referred to.]

Leck, K.C., and *A. Neilson*, for the defendants. The contract contained in the charterparty is that freight is to be paid upon the conventional quantity of 3200 tons, and the owners therefore guaranteed that the vessel should be of that dead-weight capacity. If the cargo had happened to be wheat or flour she would have actually carried 3200 tons in weight. But there is no guarantee that she will carry a bulk of maize which will weigh 3200 tons. Freight is to be paid on 3200 tons, whatever the actual weight of the cargo shipped may be. *Mackill* v. *Wright* (4) is distinguishable. Lord Watson, in delivering judgment, said that "wherever it appears that the precise nature of the cargo which the charterers had it in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes matter of reasonable inference that such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description. Of course no such inference can be admitted when it is inconsistent with the express or implied conditions of the charterparty." There is nothing in the charterparty in the present case which suggests that there is to be any reduction in freight if the vessel is unable to carry 3200 tons of the particular cargo shipped. In *Mackill* v. *Wright* (1) provision was made for the reduction of freight. The guarantee contains no reference to bulk. It simply mentions "dead-weight capacity." But in order to succeed the plaintiffs must show that the guarantee says in effect "We, the shipowners, guarantee that the vessel will carry a bulk of maize which weighs 3200 tons." Clause 5 in the charterparty relates solely to freight; clause 1 deals with the ship. Clause 5 fixes the freight by saying it is to be paid upon 3200 tons, but the plaintiffs are seeking to pay upon a smaller quantity.

MacKinnon, K.C., in reply. The present case is covered by *Mackill* v. *Wright.* (1) In that case the charterparty contained the

(1) 14 App. Cas. 106.
(2) (1889) 24 Q. B. D. 45.
(3) (1895) 1 Com. Cas. 114.
(4) 14 App. Cas. 106, 116, 117.

words "the ship shall carry." In the present case there are the equivalent words "ship's dead-weight capacity to be." A very refined distinction would be necessary if a different meaning is to be given to the two sets of words. It would be very unfortunate if in commercial cases, when matters of principle are dealt with, subtle distinctions should be drawn. If the words of guarantee in clause 5 of the charterparty merely dealt with the description of the ship, and not with the carriage of the cargo of maize, they would have been included in clause 1. The contention on behalf of the defendants gives no meaning to the word "guarantee" in clause 5. To draw a distinction between the present case and *Mackill* v. *Wright* (1) would introduce great uncertainty into contracts of this nature. The express clause in *Mackill* v. *Wright* (1) providing for the reduction of freight merely expresses that which the law implies. Clause 5 refers not to 3200 tons in the abstract, but to 3200 tons of maize. [Scrutton on Charterparties, 6th ed., art. 25, was also referred to.]

Cur. adv. vult.

July 2. The following judgment was read by

ROWLATT J. In this case the charterparty provided that the ship should load and the charterers provide at Durban a full and complete cargo of maize (the words "wheat and/or flour and/or other lawful merchandise" which are in the printed form being struck out). She was then to proceed and discharge at one of a number of ports as ordered. The freight was to be payable at and after rates which varied according to the port of discharge. Then follows this clause: "The owners guarantee the ship's dead-weight capacity to be 3200 tons and freight to be paid on this quantity." This is substituted for the printed clause, which made freight payable per ton of wheat and/or flour delivered, or, if other cargo was shipped, on a full cargo of wheat and/or flour. The effect of the alteration is to make the charterparty one at a lump sum freight, varying, however, with the port of discharge. The ship in fact had a lifting capacity of 3200 tons, but she had not cubic capacity to take on board maize of that weight. It was agreed that if she had been able to load more than 3200 tons the charterers would have been entitled to ship it

(1) 14 App. Cas. 106.

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without paying more freight, and the owners would have been entitled to call upon them to do so, though the damages, if they refused, would possibly have been nominal. These results follow because it is a lump sum freight. But the charterers say that as they could only load less they are entitled, not eo nomine to a reduction of freight, but to damages for breach of the guarantee, which damages would include (and they claim no more) return of the freight in respect of the short amount of the cargo they were able to load. The short question is, therefore, whether "ship's dead-weight capacity" in this charterparty means her capacity to carry tons of maize or her abstract lifting capacity. The latter, in my opinion, is the primary meaning of the phrase; indeed, it can have no other meaning in itself unless it is used with reference to some cargo. In this charterparty, if the cargo to be carried had merely been described as lawful merchandise, I should have thought it would have been abundantly clear that the contract simply was that freight was to be paid on the dead-weight capacity of the ship in the abstract sense, taken and guaranteed to be 3200 tons, and that the cargo carried had nothing to do with it. It could not have been contended that the guarantee was of capacity to carry 3200 tons of an average or reasonable cargo, or anything of that sort. Does, then, the mere mention of maize as the cargo to be carried change the meaning of the phrase "ship's dead-weight capacity" from a designation of the ship's lifting capacity in the abstract to a designation of something quite different, namely, of her combined lifting and cubic capacity applied to the ratio of bulk to weight existing in maize? For all I know shipowners may be aware of the weight of South African maize, which, according to the evidence, has been exported for ten or twelve years, but, if the plaintiffs' contention upon the point of construction is right, it seems to me it would have to prevail also in the case of a new kind of cargo. I cannot adopt that view unless I am constrained by authority. It seems to me to involve giving words a secondary sense by reading them in close connection with a provision in another part of the document in a case where such connection is not necessary to afford a simple and natural meaning to the whole. To test it by approaching the matter from the opposite point of view: assume the parties to have desired to provide for the carriage of a cargo of maize at a freight calculated on

the guaranteed dead-weight capacity of the ship in the strictest sense, would they not have written down exactly what they have written here ? And were they bound to add an explanation that, though they had mentioned maize as the cargo, they did not intend to change the sense of the words " dead-weight capacity " so as to make it mean " capacity to carry maize " ?

It is said, however, that the effect of *Mackill* v. *Wright* (1) is to compel them to do this. In that case the language and the circumstances were both different from what is found here. The owners guaranteed that the vessel should carry not less than 2000 tons dead-weight of cargo, and it was provided that, should the vessel not carry the guaranteed dead-weight as above, there was to be a pro rata reduction per ton to be made from the first payment of freight. The cargo was to be " all such goods and merchandise as the charterers should tender," but there was written in the margin " including machinery," and some measurements that represented the largest pieces were given. It certainly would seem clear that the deduction from the first payment of freight must have been intended to depend on the amount, if any, the ship failed in fact to take on board, which the parties could see at the time, and not on a measurement of the ship's lifting capacity, to be undertaken before the first payment of freight in order to see whether the guarantee was fulfilled. Moreover, there could be no doubt that the parties in making their bargain had had regard to the probable bulk for weight of the intended cargo. The entry of the figures in the margin was enough to show that. In short, the real dispute was whether the cargo shipped corresponded to what was intended. I do not think that that decision lays down the general rule that the mere mention of the cargo in the early part of the charterparty has the effect contended for by the present plaintiffs upon words such as we have here. I do not observe from the report of the argument of the distinguished counsel for the respondents that they ever contended for such a rule ; and I do not think that it would be making a correct use of the decision to take passages from the speeches of the learned Lords in which they state the existence of the connection in that particular case between the guarantee and the mentioned cargo for the purpose of applying it to the facts and treat those passages as affirming a

(1) 14 App. Cas. 106.

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general rule that there always must be such a connection. *Carnegie* v. *Conner* (1) does not, in my opinion, affect the point in this case.

For these reasons in my judgment this claim fails.

There was a claim for commission, which was admitted in the defence and the money paid as if brought into Court. The result is that the plaintiffs have the costs of the action except as to return of freight up to such payment, and the defendants have the costs of the issue as to freight and the general costs since the payment.

Judgment accordingly.

Solicitors for plaintiffs: *Sturton & Sturton.*
Solicitors for defendants: *Botterell & Roche.*

J. E. A.

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[IN THE COURT OF APPEAL.]

NEW CHINESE ANTIMONY COMPANY, LIMITED *v.* OCEAN STEAMSHIP COMPANY, LIMITED.

Shipping—Carriage of Goods—Bill of Lading—Prima facie Evidence of Quantity shipped—Short Delivery.

A bill of lading for antimony oxide ore stated that 937 tons had been shipped on board; in the margin was a typewritten clause "A quantity said to be 937 tons," and in the body of the bill of lading was printed in ordinary type the clause "weight, measurement, contents and value (except for the purpose of estimating freight) unknown":—

Held, that the bill of lading was not even prima facie evidence of the quantity of ore shipped, and that in an action against the shipowners for short delivery the onus was upon the plaintiffs of proving that 937 tons had in fact been shipped.

APPEAL from a judgment of Sankey J. at the trial of the case without a jury.

The master of the steamship *Tientsin*, belonging to the defendants, had received on board a quantity of antimony oxide ore, shipped by the plaintiffs at Hankow for conveyance to the Port of London. The bill of lading, signed by the master, was in these terms:

(1) 24 Q. B. D. 45.

"shipped or delivered for shipment in apparent good order and condition by the New Chinese Antimony Co., Ltd., on board the steamship *Tientsin* lying in or off the port of Hankow and bound for Shanghai nine hundred and thirty-seven (937) tons antimony oxide ore in bulk, being marked and numbered as per margin, the said goods to be delivered at the port of Shanghai to Messrs. Butterfield & Swire, and to be by them numbered and re-shipped on board the steamship *Peleus* on or about the 22nd December, 1914, and failing shipment by her by any prior or subsequent steamer . . . . . for delivery at the Port of London." In the margin of the bill of lading was the following typewritten clause: "No mark. A quantity said to be nine hundred and thirty-seven tons," while in the body of the bill of lading there was printed in ordinary type the clause "weight, measurement, contents and value (except for purpose of estimating freight) unknown."

It appeared from the evidence that the ore was mined at mines some 250 miles up country from Hankow, being brought in lighters down the rivers to Hankow, where it was taken to a place called Panoff's yard; there it was eventually loaded in lighters and shipped on board the *Tientsin* for conveyance to Shanghai, where it was transhipped into another steamer for conveyance to London. When shipped at the mines the ore weighed 960 tons, and prior to its shipment into lighters at Panoff's yard it weighed 937 tons. On arrival at London the ore was transhipped into coasting vessels and taken to Newcastle, and on delivery there it weighed 861 tons. There was evidence of the wasting nature of the ore when carried in bulk; that in wet weather it stuck to the implements employed in its transhipment, and that in dry weather it became very friable, and was liable to be blown away by the wind. The plaintiffs sued the defendants to recover the value of 76 tons, being the difference between 937 tons, the weight when the ore left Panoff's yard at Hankow, and 861 tons, its weight at its final port of destination. Sankey J. found that 53 tons of the deficiency was due to the wastage of the ore due to ordinary causes in the process of handling and transhipment, and gave judgment for the plaintiffs for 529*l.*, the value of the remaining 23 tons, which he held the defendants were not excused from delivering under the bill of lading. The defendants appealed.

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Roche, K.C., and *Claughton Scott*, for the defendants. There was no evidence as to the quantity of ore shipped. The statement in the bill of lading "said to be 937 tons" with the addition "weight unknown" is no evidence that any particular quantity was shipped: *Jessel* v. *Bath*. (1) In that case the weight shipped was stated with the addition in print of the words "weight, contents and value unknown," and Bramwell B. said (2) that the document meant that a certain quantity had been brought on board which was said by the shipper to amount to so much, but the person signing the bill of lading did not undertake to say whether that statement of weight was correct. That exactly covers the present case. If there is a definite statement in the bill of lading of the quantity of goods shipped, that is prima facie evidence that that quantity was shipped, and it then lies on the shipowner to prove that he received less: *McLean & Hope* v. *Fleming*. (3) Again, in *Smith & Co.* v. *Bedouin Steam Navigation Co.* (4) the bill of lading stated the exact quantity shipped; in the present case there is no such statement. The learned judge was therefore wrong in basing his judgment on 937 tons having been shipped. The statement in the bill of lading is no evidence of the quantity shipped, and the plaintiffs must prove what was shipped. Even if it is some evidence, it loses all its weight when it is known that the weighing took place up country in China far from the place of shipment.

Next, if the defendants are liable, the amount recoverable is limited to the "net invoice price of the goods," and the defendants are content in this case to accept that as meaning the cost, freight, and insurance: *James Nelson & Sons* v. *Nelson Line* (*Liverpool*). (5)

MacKinnon, K.C., and *R. A. Wright*, for the plaintiffs. In *Jessel* v. *Bath* (1) the question of onus of proof did not arise; it was admitted that the whole of the goods shipped were delivered. The statement in the bill of lading is prima facie evidence of the quantity shipped, and the onus is on the shipowners to prove that less was in fact shipped: *McLean & Hope* v. *Fleming*. (3) "This does not depend upon words of reservation, such as 'weight and contents unknown,' being inserted in the bill of lading. Though, whether such words

(1) (1867) L. R. 2 Ex. 267.
(2) Ibid. 274.
(3) (1871) L. R. 2 H. L. Sc. 128, 130.
(4) [1896] A. C. 70.
(5) [1906] 2 K. B. 804, 813.

appear or not, the onus of falsifying the statement in the bill of lading is upon the shipowner." The onus is upon the shipowners of proving that 937 tons were not shipped. No such evidence was given by the shipowners,

[SCRUTTON L.J. referred to *Lebeau* v. *General Steam Navigation Co.* (1) and *Hogarth Shipping Co.* v. *Blyth, Green, Jourdain & Co.* (2)]

Sankey J. does not base his finding that 937 tons were shipped on a proposition of law that the bill of lading is prima facie evidence of the quantity mentioned in it having been shipped; he bases it on the facts; he does not mention the bill of lading in terms in his judgment. "Said to be 937 tons" means, "I have not kept a tally myself, but I am told it is 937 tons, and I am willing to sign for it."

[They also cited *Bradley* v. *Dunipace.* (3)]

VISCOUNT READING C.J. The plaintiffs are shippers of Chinese antimony oxide ore, and they sue the defendants for damages for the short delivery of 76 tons shipped in bulk and received in China for conveyance to London on a through bill of lading from Hankow. Sankey J. has given judgment for the plaintiffs for 529*l.*, the value of 23 tons, and as to the remaining 53 tons he held that the loss was accounted for by wastage during transhipment owing to the inherent vice of the ore. The defendants appeal and ask that judgment may be entered for them on the ground that, while most of the findings of fact are in their favour, the learned judge attached too much weight to the statement in the bill of lading that 937 tons had been shipped. The questions raised are of some importance, and the facts require careful investigation before we come to deal with the law.

The antimony ore was first mined at Changsha, some 250 miles up country from Hankow, and the ore when shipped is carried in lighters along one or two rivers to Panoff's yard at Hankow. According to the evidence, when shipped at Changsha 960 tons were taken on board, while at Panoff's yard at Hankow there were only 937 tons, so that 23 tons had disappeared. At Hankow there is evidence to show that by the tally 937 tons were received from Panoff's yard, and it must be taken that there is no evidence to the

(1) (1872) L. R. 8 C. P. 88, 96.
(2) Ante, p. 534.
(3) (1862) 1 H. & C. 521; 32 L. J. (Ex.) 22.

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contrary. The bill of lading is dated December 16, and is for a through voyage to London via Shanghai, where the cargo was to be transhipped. After its arrival in London the ore was sent in several coasting vessels to Newcastle, and when delivered there its total weight was 861 tons. The plaintiffs bring their action to recover the difference in value between 861 and 937 tons, and on the facts proved the learned judge had before him a body of evidence for the defendants, which he accepted, to the effect that the cargo was of a particularly wasting nature; the antimony ore in wet weather stuck to the baskets in which it was placed, and when it dried the moisture evaporated, and it became very friable and was easily blown away by the wind. I may add that the cargo was shipped in bulk, which was very unusual, as it is usually shipped in bags, which is far less wasteful. As a result the shippers have lost, after allowing for wastage, according to the view of the learned judge, 23 tons of ore.

The question for us is whether Sankey J. was right in his view that the defendants are responsible for the 23 tons. The defendants called evidence to show that all the antimony put on board had been carried to Newcastle. The question is very largely one of fact, and if I could come to the conclusion that the judgment of Sankey J. depended solely on the view which he took of the evidence and did not depend on any view of law, I should not feel justified in differing from him. But after a careful examination of his judgment as a whole, and after consideration of the evidence, I have come to the conclusion that he had in mind that there was a presumption against the shipowner because of the statement in the bill of lading that 937 tons had been shipped and that he did not pay regard to the words "weight unknown," and I think that for this reason only he has allowed the 23 tons against the defendants. He has taken the view that the shipowners have not discharged themselves of the onus put upon them by what he considered was the prima facie case that 937 tons had been received by them. And for this reason he has discarded the two handlings of the ore at Hankow after leaving Panoff's yard, which took place prior to the receipt of the ore by the shippers. He had great doubt as to the weight of 937 tons at Panoff's yard, and thought it difficult to say whether the onus had been discharged. In his judgment he uses this

important language: "Apart from any handling from Hankow on board the *Tientsin* there were a number of handlings afterwards in the course of the voyage." Then he deals with the various handlings and points out that one witness put the loss on each handling at 1½ per cent., while another said that a total loss of 8 per cent. would not be at all surprising. He contrasts this with the plaintiffs' evidence, and he rejects the plaintiffs' evidence on this point and gives effect to the defendants' evidence, and then says he has come to the conclusion that "the defendants have not entirely displaced the evidence from the bill of lading that 937 tons had been shipped." On these facts I think that the learned judge came to his conclusion, not on the facts, but because he thought there was a presumption against the shipowners which they had failed to remove. If there is such a presumption in this case, it would be easily displaced. But on a broader ground this judgment cannot stand. Where in a bill of lading, which is prepared by the shippers for acceptance by the defendants' agent, the agent accepts in the margin a quantity "said to be 937 tons," and in the body of the bill of lading there is a clause "weight, &c., unknown," there is no prima facie evidence that 937 tons have been shipped. Sankey J. in my judgment omitted to give proper effect to the words "weight, &c., unknown." He based his judgment on the decision in *Smith & Co.* v. *Bedouin Steam Navigation Co.* (1), but he omitted to notice that in that case a definite quantity was given in the bill of lading and that there were no qualifying words such as "said to be" or "weight unknown." I think that the true effect of this bill of lading is that the words "weight unknown" have the effect of a statement by the shipowners' agent that he has received a quantity of ore which the shippers' representative says weighs 937 tons but which he does not accept as being of that weight, the weight being unknown to him, and that he does not accept the weight of 937 tons except for the purpose of calculating freight and for that purpose only. That is the view taken in *Jessel* v. *Bath* (2), where Martin B. says: "That is a common well-known trade, and it is obvious that goods must be shipped on board hastily, and that goods shipped in bulk at a considerable distance from the shore, as is the case at Genoa, for instance, cannot by possibility be weighed. The person, therefore,

(1) [1896] A. C. 70. (2) L. R. 2 Ex. 267, 273, 274.

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signing the bill of lading, by signing for the amount with this qualification 'weight, contents and value unknown' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter. The insertion of the weight in the margin, and the calculation of freight upon it, does not carry the matter any further; he calculates the freight, as it is his duty to do, upon the weight as stated to him. The qualification is perfectly reasonable; and I do not understand how a statement so qualified binds any one." In the same case Bramwell B. says: "This document, though apparently contradictory, means this:—a certain quantity of manganese ore has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present."

Similarly, in *Lebeau* v. *General Steam Navigation Co.* (1) Brett J. says: "When a closed case is offered to him with a representation as to the nature of its contents on the bill of lading he may accept it without alteration of the bill of lading; but if he alters the bill of lading by inserting a statement that the contents are unknown, it is clear, as a matter of business and it seems from the American cases, and *Jessel* v. *Bath* (2) to be the law, that he thereby declines to accept the declaration of the shipper; he says in effect, 'I accept this case as it appears on the outside; I know nothing about the inside, and will be bound by no statement in reference to it.' It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of lading in the modified form by which there is no binding statement as to the contents of the package." Against those authorities the plaintiffs' counsel referred to *McLean & Hope* v. *Fleming* (3), but that case does not touch the particular point with which we are dealing; it will be noticed that in that case *Jessel* v. *Bath* (2) was not cited, and the decision rests on the point that the burden on the shipowner had been discharged.

I arrive at the conclusion that the statement in the bill of lading

(1) L. R. 8 C. P. 88, 96. (2) L. R. 2 Ex. 267.
(3) L. R. 2 H. L. Sc. 128.

that 937 t ns had been shipped does not bind the shipowners except for the purpose of estimating freight, and therefore when Sankey J. assumed 937 tons as the weight shipped at Hankow because of the statement in the bill of lading he assumed a weight for which the ship owners were not liable. He ought at least to have taken into account the two handlings at Hankow; if he had done so, he would, I think, have given judgment for the defendants; but he thought he was bound to neglect them in consequence of the statement in the bill of lading. I think that this appeal must be allowed.

PICKFORD L.J. I agree, and have very little to add. It is an action to recover damages for short delivery of antimony ore shipped in bulk, and it is found on evidence which is absolutely conclusive that shipment of this ore in bulk is simply asking for trouble; there is certain to be extraordinary wastage. Accepting the evidence of the defendants as substantially correct, I should have come to the conclusion that there was no liability on the defendants for the loss of part of the cargo. But the judge did not come to that conclusion, and if it were clear that his finding was one of fact only, I should be very loth to interfere. But it is not a strict finding of fact. The real ground on which I differ from him is that I think his judgment held that this bill of lading imposed upon the shipowner the same burden that was held to exist in *Smith & Co.* v. *Bedouin Steam Navigation Co.* (1) With great respect to the learned judge, I dissent from that view. It has been argued that that view was right and that the words "weight, &c., unknown" have practically no effect. But I do not think that that is the right view. The bill of lading begins with the statement "shipped." Below that appear the words "weight, &c., unknown"; it is true that they are in print, but they cannot be disregarded. And in this case they are not the only thing to be considered, for in the margin is attached a document which says "a quantity said to be 937 tons." To attach the same weight to that as to a clean bill of lading is wrong. But, assuming that any presumption arises at all, it is very easy to upset it. The weighing was done in a way which the learned judge says was not satisfactory; I do not attach much importance to that; but the weight was not that taken when the

(1) [1896] A. C. 70.

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ore was put into the ship, but when it left Panoff's yard in lighters, and that fact is sufficient to displace any presumption that 937 tons went into the ship. Have the shipowners delivered the weight of cargo which went into the ship? There is ample evidence that they delivered all that went in, allowing for wastage by handling. There were eight handlings from Hankow to Newcastle, and the judge has expressly excluded two handlings at Hankow; in this I think he was wrong, for there would be a certain amount of loss. I think the learned judge did not proceed on the right basis, and I see no difficulty in differing from his findings of fact. The result of the evidence is that the shipowners have delivered all that was shipped less the amount wasted in handlings.

SCRUTTON L.J. I have come to the same conclusion, and, as I am differing from the learned judge in the Court below, I think it well to give shortly the reasons for my opinion. I should be very slow to differ from a learned judge who on a pure question of fact had arrived at a conclusion merely because I should myself have arrived at a different one. The action is one to recover damages for short delivery of a cargo of antimony ore; the case of the plaintiffs is that 937 tons were put on board at Hankow and 861 tons were delivered at Newcastle, showing a shortage of 76 tons. The learned judge held that the disappearance of 53 tons was accounted for by the wasting nature of the cargo, and that the defendants were liable for the non-delivery of the remaining 23 tons. The cargo is undoubtedly by nature wasting; if shipped wet, some of it adheres to the baskets in which it is carried; if dry, it blows away, and there is wastage at every handling. There is obviously difficulty in deciding what is lost through the inherent defect in the cargo. The first question is, what amount was shipped? The learned judge says 937 tons, and in support of this view refers to *Smith & Co.* v. *Bedouin Steam Navigation Co.* (1) It seems clear that Sankey J. started with the bill of lading as being prima facie evidence of the shipment of 937 tons, which it lay on the shipowners to displace. It is of course true that statements in a bill of lading may be conclusive against the shipowner, as under s. 3 of the Bills of Lading Act, in cases where they are signed by certain people and sued on by certain people

(1) [1896] A. C. 70.

mentioned in that section. They may be so when other persons for value have acted upon the statements and when an estoppel is established against the shipowner because he has made a statement knowing it may be acted on by another person who has given value on the faith of that statement. A well-known example of that is the case of *Compania Naviera Vasconzada* v. *Churchill & Sim.* (1) If the statements are not conclusive, they may at any rate be prima facie evidence against the shipowner. But, in my view, this particular bill of lading is not prima facie evidence of any weight at all. Suppose a box, described as a "box of jewels," were deposited for safe custody at a bank, and a receipt were given for it in the words "received, contents unknown," there would be no evidence of the receipt of any jewellery. The learned judge starts with the assumption that the bill of lading is prima facie evidence of the shipment of 937 tons; I start with the assumption that it is no prima facie evidence of it. It is pressed upon us that our view is very inconvenient to shippers; but the answer is that some nations have by statute provided for such a state of things, as the United States has done by s. 4 of the Harter Act and Canada in the Dominion of Canada Act, 1910. The shippers start here with the burden of showing what quantity was put on board, and say that the ore was weighed at Panoff's yard at Hankow. If we start with the weighing at Panoff's yard, there are two handlings before shipment which have not been considered by the judge, who thought the bill of lading prima facie evidence of the weight shipped, and allowing 1 per cent. for each of the handlings, the loss would be very nearly accounted for. The learned judge has started with an error in regard to the bill of lading, and has disregarded the two handlings, which would account for the waste of cargo. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Ballantyne, Clifford & Hett.*

Solicitors for defendants: *Stokes & Stokes, for Cameron, MacIver & Davie, Liverpool.*

(1) [1906] 1 K. B. 237.

W. J. B.

1917
May 23.

GILL *v.* CARSON AND NIELD.

Highway—Wilfully causing Obstruction in Public Thoroughfare—Evidence of unreasonable User of Highway—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 28.

By s. 28 of the Town Police Clauses Act, 1847, "every person who . . . . by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means . . . . wilfully causes any obstruction in any . . . . public thoroughfare," is made liable to a penalty :—

Held, that to constitute the offence of wilfully causing an obstruction within the meaning of the section there must be an unreasonable use of the thoroughfare. It is, however, not necessary that any person should be actually obstructed ; it is sufficient if circumstances exist from which justices before whom a charge of wilfully causing an obstruction is brought can conclude that in the ordinary course persons may be obstructed, and that the actual use of the road was calculated to obstruct.

Reg. v. *Long* (1888) 59 L. T. 33 ; 52 J. P. 630 (where it appears to have been held that it is necessary to show that some person was actually obstructed) explained by Avory J.

Per Shearman J. : *Reg.* v. *Long* (supra) was impliedly overruled by *Hinde* v. *Evans* (1906) 70 J. P. 548 and must no longer be considered an authority.

The appellants at 4 P.M. on an afternoon left two vehicles (four-wheeled), each with a horse between the shafts and a chain horse in front, standing unattended for five minutes in a main road 25 yards wide from kerb to kerb with two sets of tram lines down the centre. Any vehicle proceeding in the same direction as that in which the appellants were in the course of travelling would have to draw on the tram lines, and so would obstruct the tram until the vehicle had passed the stationary vehicles of the appellants or had otherwise crossed over to the wrong side of the road. The horses had just been watered by the ostler of an inn used as a baiting-house, the appellants being found in the inn, where they were having something to eat :—

Held, that there was no evidence of an unreasonable user of the highway, and that the appellants had not wilfully caused an obstruction in the highway within the meaning of the section.

CASE stated by justices for the county of Lancaster.

An information was preferred by the respondent Carson, superintendent of police for the division of Ashton-under-Lyne, against the appellant Gill for that he on May 17, 1916, at Droylsden in

the county of Lancaster, did obstruct the free passage of Manchester Road there contrary to s. 28 of the Town Police Clauses Act, 1847 (1); and an information in identical terms was also preferred by the respondent against the appellant Nield.

The two informations were heard together by the justices for convenience as the facts were the same in each case.

Upon the hearing of the informations the following facts were found by the justices:—At 4 P.M. on May 17, 1916, two police officers observed two vehicles (four-wheeled), each with a horse between the shafts and a chain horse in front, left unattended in Manchester Road, Droylsden. The vehicles were loaded with bags of cotton or waste. The horses had just been watered by the ostler of an inn used as a baiting-house, and the horses and vehicles remained there stationary without any one in charge for a period of five minutes, the appellants being found in the inn, where they were having something to eat. Manchester Road is a main road 25 yards wide from kerb to kerb with two sets of tram lines down the centre. Any vehicle proceeding in the same direction as the appellants would have to draw on the tram lines, and so would obstruct the tram until the vehicle had passed the stationary vehicles of the appellants or had otherwise crossed over to the wrong side of the road.

On behalf of the appellants it was contended that there was no evidence of obstruction.

The justices were of opinion that, although there was no evidence of any one having been actually obstructed, the fact of the appellants leaving their horses and vehicles in the manner previously described was calculated to obstruct other users of the road: *Reg.* v. *Fermanagh Justices.* (2) They also held, following *Homer* v. *Cadman* (3), that the action of the appellants rendered the highway less convenient and commodious to the public. Further, following

(1) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28: "Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty . . . . ; (that is to say,) . . . . Every person who . . . . by means of any cart, carriage, ... or any animal, or other means . . . . wilfully causes any obstruction in any . . . . public thoroughfare:"

(2) (1883) 14 L. R. Ir. 50.

(3) (1886) 50 J. P. 454.

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Lowdens v. *Keaveney* (1) and *Wilkins* v. *Day* (2), they were of opinion that the appellants did not use the highway in a reasonable manner and obstructed the highway in the sense that they impeded its proper use. The justices accordingly convicted both appellants. The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

Ashton, *K.C.*, and *R. Sutton*, for the appellants. In order that the offence with which the appellants were charged may be committed there must be actual wilful obstruction. Where there is no actual obstruction the mere fact that an obstruction might be caused if vehicles came up is not causing "wilful obstruction" within the meaning of s. 28 of the Town Police Clauses Act, 1847, under which the appellants were charged. Whether they used the highway in a reasonable way is a question of fact depending on the circumstances, and there was no evidence which justified the finding of the justices that the user by the appellants was unreasonable: *Original Hartlepool Collieries Co.* v. *Gibb.* (3) In *Reg.* v. *Fermanagh Justices* (4) it was a necessary inference from the facts that some person must have been obstructed between the hours of 9.30 A.M. and 5.30 P.M. In *Homer* v. *Cadman* (5) there was not a lawful user of the highway. *Lowdens* v. *Keaveney* (1) and *Wilkins* v. *Day* (2) have no bearing upon the present case. If there is not an unreasonable user of the highway there is no obstruction. There is nothing upon the findings of the justices which shows that some person must have been obstructed. Had any other vehicles come up it would have been the duty of the persons in charge of them to act reasonably, in which case no obstruction would have ensued. In *Hartley* v. *Chadwick* (6) there was a serious obstruction. So also in *Reg.* v. *Long* (7), in which there was a conviction under the same section as is now before the Court, but the conviction was quashed upon a writ of certiorari. [The Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), was also referred to.]

(1) (1903) 67 J. P. 378.
(2) (1883) 12 Q. B. D. 110.
(3) (1877) 5 Ch. D. 713, 721.
(4) 14 L. R. Ir. 50.
(5) 50 J. P. 454.
(6) (1904) 68 J. P. 512.
(7) 59 L. T. 33; 52 J. P. 630.

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Jeeves, for the respondents. In order to constitute the offence under s. 28 of the Town Police Clauses Act, 1847, of wilfully causing an obstruction in a highway it is not necessary that any person should be actually obstructed: *Hinde* v. *Evans*. (1) Unreasonable user is a question of degree. It is a question for the justices whether it is reasonable for a person to have his meals at 4 P.M.

VISCOUNT READING C.J. The question before the Court is whether there is any evidence upon which the justices could, under s. 28 of the Town Police Clauses Act, 1847, convict the appellants of wilfully causing an obstruction in a public thoroughfare. An offence is committed under the section if a person wilfully causes any obstruction. The only question is, What do those words mean? For a person merely to stand still, or to cause his horse and cart to stand still, in the roadway is not causing an obstruction. An obstruction will only be caused if there is an unreasonable use of the road by stopping. I think that the language of Sir George Jessel M.R. in *Original Hartlepool Collieries Co.* v. *Gibb* (2) is very much to the point. It is quite true that he was dealing with another statute and with other words, but he explained what was the right of access which a person has to the highway, and pointed out that the real question is, Has there been anything unreasonable in the user of the highway?

If upon the facts found in the present case there were any evidence of an unreasonable user of the highway, this Court could not interfere, whatever decision we might ourselves have come to, but I have come to the conclusion that there is no evidence of an unreasonable user of the highway. I think that the justices were probably influenced by the fact that the horses were left unattended, and that they convicted the appellants of wilfully causing an obstruction because the horses were left unattended. That is a very pertinent fact to be taken into consideration, and—coupled with other facts, e.g. a lengthened period of time for the purposes which have been described—it might properly constitute the offence of wilfully causing an obstruction.

In my judgment it is not necessary to prove that a person has been actually obstructed. It is quite sufficient to prove circum-

(1) 70 J. P. 548. (2) 5 Ch. D. 713, 721.

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stances from which the justices can conclude that in the ordinary course persons may be obstructed, and that the actual use of the road was calculated to obstruct even though no person was proved to have been obstructed. I think the language of Lord Alverstone C.J. in *Hinde* v. *Evans* (1) sufficiently points that out.

In the present case I come to the conclusion that there is no evidence upon which the justices could decide that there had been an obstruction, and therefore this appeal must be allowed and the conviction quashed.

AVORY J. I am of the same opinion. The reason why the horses were standing was that there was a lawful excuse for it, in this sense, that the men had gone to get their dinner or tea, and the horses were stopped in order that they might be watered. In these circumstances I agree that there was no evidence before the justices of any unlawful or unreasonable user of the highway. It may be that the men by leaving their horses unattended rendered themselves liable to be summoned under another paragraph of the same section, because it is an offence for any person having the care of any wagon or cart to be at such a distance from the wagon or cart as not to have due control over every animal drawing the same, and it is possible, therefore, that the appellants could have been summoned under that part of the section, but that point is not before us. It is sufficient to say that there was no evidence upon which the justices could decide as they did, and therefore the conviction must be quashed.

It may be important to add with regard to *Reg.* v. *Long* (2) that the defendants in that case were summoned under the latter part of the section, which provides that any person who by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts or causes any obstruction, shall be liable to a penalty, and I think the real ground of the decision was that persons walking on the footpath were not using "other means" ejusdem generis with cart, carriage, or any animal.

SHEARMAN J. I am of the same opinion. I do not think this case in itself involves the decision of any new point of law, and

(1) 70 J. P. 548. (2) 59 L. T. 33; 52 J. P. 630.

I should not have added anything if it had not been that in *Reg.* v. *Long* (1) it appears to have been held that unless there was obstruction in the sense that some person was proved to have been actually obstructed there could not be a conviction under the section. In *Hinde* v. *Evans* (2) the judgment of Lord Alverstone C.J. impliedly overruled *Reg.* v. *Long* (1), which ought not to be considered as an authority.

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Shearman J.

Appeal allowed.

Solicitors for appellants: *Rochester, Pusey & Co., for T. A. Needham, Manchester.*

Solicitors for respondent: *Snow, Fox & Co., for Sir H. E. Clare, Preston.*

J. E. A.

Distinguished. K. C. SETHIA (1944), LTD. *v.* PARTABMULL RAMESHWAR. [1950] 1 All E.R. 51.

[IN THE COURT OF APPEAL.]

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June 14, 15.

In re AN ARBITRATION BETWEEN THE ANGLO-RUSSIAN MERCHANT TRADERS, LIMITED, AND JOHN BATT & CO. (LONDON), LIMITED.

Sale of Goods—Implied Term—Contract to ship Aluminium—Prohibition against Export without a Licence—Implied Obligation—Prohibition against Buying, Selling, or Dealing in Aluminium—Shipment from Foreign Country—Defence of the Realm (Consolidation) Regulations, 1914, *reg.* 30A.

By a contract made in London, and dated August 19, 1915, the appellants sold to the respondents, both parties being resident in this country, 50 tons of aluminium "to be shipped by steamer(s) to Vladivostok during December/January next," at a price including cost and freight; payment to be by cash against documents in London. At the date of the contract there was, to the knowledge of both parties, a prohibition against the export of aluminium from this country except on licence granted by the British Government. On December 7, 1915, an order was made applying reg. 30A of the Defence of the Realm (Consolidation) Regulations, 1914, to aluminium. That regulation provides that "no person shall, without a permit . . . . (*a*) buy, sell, or deal in; or (*b*) offer or invite an offer or propose to buy, sell, or deal in; or (*c*) enter into negotiations for the sale or purchase of or other dealing in, any war

(1) 59 L. T. 33; 52 J. P. 630. (2) 70 J. P. 548.

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material" to which the regulation might be applied by order, whether or not the sale, purchase, or dealing was effected in the United Kingdom.

No aluminium was shipped under the contract. The buyers claimed damages for breach of contract, and the dispute was referred to arbitration. The umpire found that the parties in fact contemplated that the aluminium would be shipped from this country, and that neither of the parties contemplated or intended the performance of the contract by shipment of American aluminium; that the sellers duly applied for a licence to export the aluminium from this country, but a licence was refused, and that the failure to ship was due to their inability to obtain a licence; and that the sellers did not, after December 7, 1915, or at all, apply for a permit to purchase aluminium in America so as to ship it from there, but if they had so applied the proper authority in this country would not have granted a permit:—

Held, upon the assumption that the shipment was limited to a shipment from the United Kingdom, that the contract did not impose upon the sellers an absolute obligation to ship or to pay damages in default of shipment, and that therefore the sellers, who had used reasonable diligence to obtain a licence to ship, were not liable in damages to the buyers.

Held, further, that the shipment was not limited by the contract to a shipment from the United Kingdom; that reg. 30A of the Defence of the Realm (Consolidation) Regulations prohibited any dealing in the widest sense in aluminium in any country by persons amenable to British law, and therefore prohibited the shipment by the sellers of aluminium on and after December 7, 1915, from any country; and that consequently before there was any default on the part of the sellers the further performance of the contract became illegal, and they were not liable in damages.

APPEAL from the judgment of Bailhache J. upon an award in the form of a special case.

By a contract note made in London, and dated August 19, 1915, John Batt & Co. (London), Limited, "sold to" the Anglo-Russian Merchant Traders, Limited, of London, 50 tons of aluminium notched bars 98 to 99 per cent. "to be shipped by steamer(s) to Vladivostok during December/January next. Price, £180 (one hundred and eighty) per ton cost and freight to Vladivostok . . . . Payment: Cash against documents by London bank. Confirmed credit to be opened within seven days." Any dispute arising out of the contract was to be referred to arbitration in London in the usual way, and all the terms of the contract were to be construed and all questions under it settled according to the law of England. A dispute which

arose under the contract was referred to arbitration, and, the arbitrators having differed, the umpire made his award in the form of a special case, which, omitting formal parts, was as follows :—

" 2. At the date of the contract there was to the knowledge and in the contemplation of the sellers and buyers a prohibition of export of aluminium from this country except on licence granted by the British Government.

" 3. The parties in fact contemplated that the aluminium sold under the contract would be delivered and shipped from this country c. and f. to Vladivostok, but (if and so far as it is material) I find that a tender of American aluminium shipped from an American port c. and f. to Vladivostok would have been a good tender under the contract.

" 4. On and after December 7, 1915, it was prohibited by an order under regulation 30A of the Defence of the Realm (Consolidation) Regulations, 1914, for any person in this country to buy, sell, or deal in, or to offer or invite an offer or propose or to negotiate to buy, sell, or deal in aluminium, whether or not such sale, purchase, or dealing was to be effected in the United Kingdom, unless authorised by a permit from the British Government.

" 5. The sellers duly applied to the proper authority for a permit to export the aluminium sold under the contract from this country, but a permit was refused.

" 6. No shipment or delivery was made or tendered by the sellers under the contract.

" 7. I find that the failure of the sellers to ship the aluminium in fulfilment of the contract from this country was due to their inability to obtain a permit.

" 8. The sellers did not after December 7, 1915, or at all, apply for any permit to purchase in America aluminium so as to ship it from America as under the contract. The reason why they did not so apply was because they did not contemplate or intend at any time to fulfil the contract by a shipment of American aluminium. If they had so applied, I find that the proper authority in this country would not have granted a permit.

" 9. The buyers claim damages from the sellers for their total failure to ship the aluminium under the contract. I find that the damages recoverable (if any) are 2500*l.*

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"10. I find (if and so far as it is a question of fact) that the possibility of British subjects shipping aluminium from America without a permit up to December 7, 1915, is irrelevant to the issues raised in this arbitration, neither of the parties having contemplated or intended the performance of the contract by shipment of American aluminium.

"11. I hold that the contract note in question is not subject to any implied term that the sellers' obligation to ship is subject to their being able to obtain a permit to ship from this country from the British authorities. I hold that there being no express term, such as 'subject to permit being obtained,' the sellers assumed the obligation and risk of being able to obtain a permit equally with the obligation and risk of obtaining the goods or freight room. I accordingly hold that the sellers having failed to ship cannot excuse such failure on the ground that they could not obtain a permit, and are liable in damages for such failure to ship, and I assess such damages at 2500*l.*

"12. Subject to the opinion of the Court I award that the sellers pay to the buyers 2500*l.* damages . . . .

"13. The question for the opinion of the Court is whether I am right in law in so deciding that a seller under a c. and f. contract (shipment being contemplated as between both parties to be from this country) is not excused from failing to ship by reason of the fact that he is unable to ship because unable to obtain a permit to ship, the parties having contracted with knowledge of and in contemplation of an existing prohibition of export, under which no shipment could be effected without a licence from the British Government.

"14. If the Court is of opinion that I am right in so holding, then my award will stand. If it is of the contrary opinion, this award will be set aside and the buyers will recover nothing from the sellers. . . . ."

Bailhache J. said that the sellers made a contract to ship aluminium knowing that there was a prohibition against the export of aluminium from this country without a permit. They did not provide for that and make the contract subject to their being able to obtain a permit. In his opinion the umpire was right, and the award must be confirmed.

The sellers appealed.

A second question, which was not before Bailhache J., was, by agreement between the parties and the consent of the Court, added for the opinion of the Court, so as to save the expense of remitting the case to the umpire :—

" Does regulation 30A of the Defence of the Realm (Consolidation) Regulations, in view of the facts found as to shipment from America, afford a defence to the sellers for failure to ship under the contract ? " It was agreed that the Court might draw the necessary inferences of fact for the purpose of answering this question.

Leck, K.C., and *T. Mathew*, for the sellers. As to the first question, both parties knew at the time of making the contract that it would be illegal to ship the aluminium from this country unless a licence was first obtained. Both parties must have intended that the contract should be carried out in a legal manner. A term must therefore be implied in the contract that it is subject to a licence to export being obtained. To read the contract as imposing an absolute obligation to ship would be to make the contract illegal and to impose a liability to pay damages for breach of that illegal contract. The contract cannot be read as importing an undertaking by the sellers to obtain a licence. The highest term which can be implied is that the sellers will use due diligence to obtain a licence, and having done so there has been no breach of contract.

With regard to the second question, the sellers could not legally have shipped the aluminium from America or elsewhere on or after December 7, 1915, in consequence of reg. 30A of the Defence of the Realm (Consolidation) Regulations. From that date it became illegal to deal in any way in aluminium. The parties being British subjects are bound by that regulation, and the umpire has found that a permit to ship from America would have been refused. Therefore before any default was made by the sellers the regulation made it illegal for them to perform the contract. The regulation is in very wide terms, and strikes at all dealings in aluminium.

Leslie Scott, K.C., and *Duckworth* (*J. H. Harris* with them), for the buyers. As to the first question, both parties knew at the time when they made the contract that aluminium could not be shipped from this country without a licence. Some term must be

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implied in the contract in order to give to the transaction such business efficacy as both parties must have intended it should have: *The Moorcock* (1); *Hamlyn & Co.* v. *Wood & Co.* (2); *Lazarus* v. *Cairn Line.* (3) In order to give the contract its business efficacy it is necessary to imply a term that the sellers undertook to obtain a licence and to ship the aluminium. The alternative suggested is that the contract is subject to the sellers obtaining a licence. This would render the contract valueless to the buyers from a business point of view. The buyers wanted to be certain of getting the aluminium so that they might be in a position to make their business arrangements accordingly. No buyer would take the risk of the seller obtaining a licence. "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility . . . . might have been anticipated and guarded against in the contract": *Baily* v. *De Crespigny* (4). The contract so construed is not to do an illegal act, because a licence to ship can be obtained. The contract is unqualified and absolute, and the risk of doing everything to carry out the contract is on the sellers.

Next, reg. 30A of the Defence of the Realm (Consolidation) Regulations does not affect this case. It does not affect the carrying out in America of the contract of sale made before December 7, 1915. Its object is to prevent the price of aluminium being run up in this country. The words "buy, sell, or deal in" do not, for instance, prohibit the appropriation to the contract of aluminium bought by the sellers in America before December 7, 1915. Nor does it prohibit the shipment of aluminium already bought. The regulation strikes at future purchases or sales of, or other similar dealings in, aluminium. Further, the sellers cannot take advantage of reg. 30A because they never applied for a permit.

Leck, *K.C.*, in reply. With regard to the last point, the umpire has found that a licence under reg. 30A would have been refused. As to the meaning of the word "sale" in reg. 30A, the agreement of August 19, 1915, was an agreement to sell: Sale of Goods Act, 1893

(1) (1889) 14 P. D. 64, 68.
(2) [1891] 2 Q. B. 488, 491.
(3) (1912) 17 Com. Cas. 107, 113.
(4) (1869) L. R. 4 Q. B. 180, 185.

(56 & 57 Vict. c. 71), s. 1, sub-s. 3; and the regulation would prohibit the purchase or appropriation of aluminium after December 7, 1915, so as to convert that agreement into a sale.

VISCOUNT READING C.J. The first question which we have to answer is whether the umpire was right in law in deciding that a seller under a c. and f. contract (shipment being contemplated as between both parties to be from this country) is not excused from failing to ship by reason of the fact that he is unable to ship because he is unable to obtain a permit to ship, the parties having contracted with knowledge of and in contemplation of an existing prohibition of export, under which no shipment could be effected without a licence from the British Government. Assuming, for the purpose of answering this question, that the contract must be construed as a contract to ship from the United Kingdom only, the point is whether or not the law will imply from the language of the contract and the circumstances that there was an absolute obligation on the sellers to ship the aluminium or, if they could not do so, to pay damages. The umpire has found that the failure to ship was due to the inability of the sellers to obtain a permit, though they did their best to obtain it; that the contract was not subject to any implied term that the sellers' obligation to ship was subject to their being able to obtain a permit; and that, there being no express term such as "subject to permit being obtained," the sellers assumed the obligation and risk of being able to obtain a permit equally with the obligation and risk of obtaining the goods or freight room, and were liable in damages. I am unable to agree with that view of the law as applicable to this contract, and, but for the fact that the learned judge came to the conclusion that the decision of the umpire was right, I should have thought that the matter was fairly clear.

The question is what is the obligation of the sellers under the contract? It is admitted by both parties that some obligation must be implied in the contract. In my opinion the implied obligation is no higher than that the sellers shall use their best endeavours to obtain a permit. That is a term which is necessary to give to the contract such business efficacy as both parties must have intended, when they entered into the contract, that it should have, within the principle laid down by Bowen L.J.

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in *The Moorcock*. (1) That statement of the principle has not been affected by any subsequent case, and it has always been accepted as correct. The difficulty lies in the application of the principle to the particular case.

The buyers contend that the implied obligation is that the sellers will obtain a licence to ship, and that if they do not they will pay damages. That is to say, that the obligation to ship is absolute. In my opinion, if it were an absolute obligation, it would be contrary to the law of England which governs this case. There was at the time of making the contract and at all material times a prohibition against the export of aluminium except under a licence. If a licence cannot be obtained aluminium cannot be shipped, and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced. I cannot agree that, in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an absolute obligation to ship whether a licence was or was not obtained. A party to a contract may warrant that he will obtain a licence, but no such term can be implied in this case. The reasonable view of the contract, in my opinion, having regard to the statement in *The Moorcock* (1), is that the sellers sold subject to their being able to ship under a licence and that they impliedly undertook to use their best endeavours to obtain a licence. The umpire has found that they used their best endeavours, the failure to ship being due to their inability to obtain a licence, and therefore there has been no breach of contract.

Having regard to the course which the case has taken in this Court, that does not dispose of the case. The umpire has found that the parties contemplated shipment from the United Kingdom alone. We do not know what were the materials upon which the umpire arrived at that conclusion. On the second question before us we have to consider the meaning of the contract in this respect. The contract is to ship to Vladivostok, and that contract could be implemented by shipment outside the United Kingdom. Looking at the document only, it cannot be construed as meaning shipment from the United Kingdom only. The words "cash against docu-

(1) 14 P. D. 68.

ments by London bank" are not of themselves sufficient to lead to the conclusion that the shipment must be from the United Kingdom, and apart from those words I see no other ground for suggesting that the shipment is so limited. It would be no defence to the sellers to say that they failed to obtain a licence to export the aluminium from this country, inasmuch as the contract did not restrict the shipment to one from the United Kingdom.

If the matter had rested there my decision would have been against the sellers. But the sellers have set up the defence that by reg. 30A of the Defence of the Realm (Consolidation) Regulations there is a prohibition against shipping aluminium from America or elsewhere. An order made under reg. 30A brought aluminium within the operation of that regulation as from December 7, 1915, and the defence is that from that date the sellers could not fulfil their contract by buying, selling, or dealing in aluminium anywhere outside the United Kingdom. This matter was not before Bailhache J. I have come to the conclusion that it is a good defence to the claim, and that from December 7 it was not open to the sellers to ship aluminium from America or elsewhere, and there has been no breach by them of their obligation under the contract for which they are liable in damages. It is contended for the sellers that on and after December 7 they could not, by reason of the regulation, even from their own stock, have shipped the aluminium, as, being amenable to British law, they would be committing an illegal act by doing so. It is on the other hand contended on behalf of the buyers that the regulation only prohibits buying or selling or dealing in aluminium, and does not touch the position of a person who has acquired or made an agreement for the purchase of aluminium in America or elsewhere before December 7, 1915. No doubt the regulation does not specifically prohibit the shipment of aluminium, but it is very wide in its scope. "No person shall, without a permit . . . . either on his own behalf or on behalf of any other person (*a*) buy, sell, or deal in; or (*b*) offer or invite an offer or propose to buy, sell, or deal in; or (*c*) enter into negotiations for the sale or purchase of or other dealing in, any war material to which this regulation may for the time being be applied by order . . . . whether or not the sale, purchase, or dealing is, or is to be, effected in the United Kingdom." In my view we must give the widest meaning to the language there

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used. The regulation seems to me to be intended to control not only the market price of this war material, but also the supply which is limited, whereas the demand is practically unlimited. It was considered necessary to restrict all dealings in aluminium. I do not think that the regulation is limited to the making of an agreement to buy or sell. It covers an appropriation of war material to an agreement to sell and also any dealing in it in the widest sense of the word.

The result is that it would have been illegal for the sellers to have shipped the aluminium from America on or after December 7, 1915. Their obligation under the contract was to ship during December, 1915, or January, 1916. They were entitled to the whole of that time to perform the contract. They were not in default on December 7. By reason of the operation of reg. 30A they were unable to ship after December 7, 1915. There was therefore no breach by them of their obligation to ship to Vladivostok during December, 1915, or January, 1916, and upon that defence, which is now open to them, they succeed. The buyers therefore recover nothing from the sellers, and the appeal will be allowed.

LORD COZENS-HARDY M.R. I agree.

SCRUTTON L.J. I have come to the same conclusion. There was a prohibition against the shipment of aluminium from the United Kingdom without a permit. In these circumstances the sellers in August, 1915, contracted to ship aluminium to Vladivostok during December, 1915, or January, 1916. They were unable to obtain a permit. The umpire has stated the question to be whether he was right in deciding that a seller under a c. and f. contract (shipment being contemplated as between both parties to be from this country) is not excused from failing to ship by reason of the fact that he is unable to ship because unable to obtain a permit to ship, the parties having contracted with knowledge of and in contemplation of an existing prohibition of export, under which no shipment could be effected without a licence from the British Government. The learned judge agreed with the umpire. We have to decide whether that is right. The sellers could only export aluminium under a licence. They contracted to export it. There are two alternatives

suggested. Have they contracted to get a licence or pay damages though it may be illegal to export? Or have they contracted to use reasonable diligence to get a licence, and, having been unable to obtain one, are they relieved from any liability because a contract which is illegal cannot be enforced? In order to support the learned judge's construction of the contract it is necessary to make a large implication in the contract. A large number of words would have to be read into it. In the view I take of the meaning of the contract very few words have to be read in. Bearing in mind the statement of Bowen L.J. in *The Moorcock* (1), I cannot think it necessary in order to give business efficacy to the contract to read it as meaning that the sellers undertook the obligation of getting a licence or paying damages. It is sufficient in order to give business efficacy to the contract to hold that no higher obligation can be implied than that the sellers would use reasonable diligence to get a licence. I therefore answer the question put to the Court in the special case by saying that the umpire's decision was wrong.

There is, however, another point which appears upon the case, but upon which the umpire has not asked the Court any question. This point relates to reg. 30A of the Defence of the Realm (Consolidation) Regulations. In this Court counsel agreed, instead of remitting the case to the umpire, that the Court should deal with the question as if it had been stated in the special case. Down to December 7, 1915, there was no prohibition against shipping aluminium from America or elsewhere outside the United Kingdom, and there is nothing in the contract which excludes such a shipment. The umpire has found that a tender of American aluminium shipped from an American port would have been a good tender under the contract. He has also found that the parties in fact contemplated that the aluminium would be shipped from this country, and that the sellers did not contemplate or intend at any time to fulfil the contract by a shipment of American aluminium. If this were an application to rectify the contract those findings would be material, but arbitrators have no jurisdiction to rectify a contract. The sellers might under the contract have shipped aluminium from the United States. This, however, the sellers say, could only have been done down to December 7, but not afterwards,

(1) 14 P. D. 68.

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because the regulation rendered it illegal. The buyers in answer say that that is not so; that it was not illegal to perform the contract by shipping from the United States; that the regulation only made it illegal to buy the aluminium in the United States; and that therefore the sellers might have performed the contract by shipping aluminium from their own stock bought before that date. The answer given by the sellers to that argument is that an agreement to sell is one thing and a sale is another; and that if the sellers on or after that date appropriated aluminium to the contract, there would be a "sale" of it in breach of the regulation. The distinction between a sale and an agreement to sell is well known. One of the last cases upon the subject is *Lambert* v. *Rowe* (1), where it was held that the word "sell" in s. 13 of the Markets and Fairs Clauses Act, 1847, was used in a popular and not its strict legal sense. The language, however, of reg. 30A is extremely wide, and shows an intention to include within its scope everything connected with the sale. It seems to me, therefore, that the answer given by the sellers to the buyers' contention on this point is correct, and that to appropriate in the United States on or after December 7 to the contract of sale aluminium agreed to be purchased before that date would have been a sale of or dealing in aluminium within reg. 30A. Therefore all performance of the contract after December 7 became illegal, though under the terms of the contract the sellers had up to the end of January to perform it.

The answer to the second question should also be in favour of the sellers.

Appeal allowed.

Solicitors for buyers: *Seaton Taylor & Co.*
Solicitors for sellers: *Shepheards & Walters.*

(1) [1914] 1 K. B. 38.

W. F. B.

[IN THE COURT OF APPEAL.]

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Employer and Workman—Compensation—"Weekly payment"—Agreement to make weekly Payment and provide other Benefits—Redemption—Workman's Right to Review—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 16, 17.

The right to redeem a weekly payment conferred on an employer by par. 17 of Sched. I. to the Workmen's Compensation Act, 1906, extends to every weekly payment which may be reviewed under par. 16, and is not limited to the case where the weekly payment is the sum total of the compensation agreed upon or awarded.

In 1910 a workman met with an accident which resulted in a broken ankle. His earnings prior to the accident were 1*l.* 16*s.* 4*d.* a week. The employers paid him half wages until October, 1913. In October, 1913, an agreement was made between the employers and the workman by which the employers agreed (1.) to find him a house near the colliery; (2.) to find him suitable light work at which he could sit down; (3.) to pay him 8*s.* 10*d.* a week compensation; and (4.) to pay him wages at a rate which would enable him to earn on an average 1*l.* 7*s.* 6*d.* a week. The workman did not insist on the first stipulation of the agreement, and had not found it necessary to insist on having work at which he could sit down. The employers found him suitable work and paid him his wages and the 8*s.* 10*d.* a week. In November, 1916, the employers applied to the county court judge, under par. 17 of Sched. I. to the Workmen's Compensation Act, 1906, that their liability therefor might be redeemed, on the footing that the incapacity was permanent. The county court judge by his award found that permanent incapacity was established to the extent of at least the weekly payment of 8*s.* 10*d.*, and ordered redemption of that payment at a lump sum of 221*l.* 6*s.*, but made a declaration that the redemption was without prejudice to the continuing validity of the remaining terms of the agreement, and also to any further liability of the employers to pay further compensation to the workman, if at any time it should be found that his capacity had been diminished below the average weekly earning capacity of 1*l.* 7*s.* 6*d.* in consequence of the old injury:—

Held, that the award must be set aside on the grounds (1.) that the county court judge had not found that the incapacity was permanent, and (2.) that, as an award must be final and conclusive, he had no jurisdiction to insert in it a declaration as to future liability.

Held, also (Bankes L.J. dissenting), that the 8*s.* 10*d.* a week was

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a "weekly payment" within par. 17, and notwithstanding that it formed part only of the compensation to which the workman was entitled under the Act, and that it was accordingly subject to redemption.

Held, therefore, that the case must be remitted to the county court judge to determine whether the incapacity was permanent, and, if he came to the conclusion that it was not, then to award such a lump sum as he thought fit; but that before making such an award an opportunity ought to be afforded the workman, if he deemed the weekly payment inadequate, of applying to review under par. 16.

APPEAL and CROSS-APPEAL from an award of the judge of the Barnsley County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

On August 13, 1910, the workman, Joseph Clawley, a collier in the employ of the Carlton Main Colliery, Limited, met with an accident which resulted in a broken ankle. His earnings prior to the accident were 1*l.* 16*s.* 4*d.* a week. The employers voluntarily paid him as compensation half of this sum per week until October, 1913. In October, 1913, an agreement was made between the employers and the workman the effect of which was thus stated by the workman in his answer—first, that the employers would find the workman a house to live in near the colliery; secondly, that they would find him work on the screens, or other suitable light work, at which he could sit down; thirdly, that they would pay him 8*s.* 10*d.* a week compensation; and, fourthly, that they would pay him wages at a rate which would enable him to earn on an average 1*l.* 7*s.* 6*d.* a week.

The 8*s.* 10*d.* was the difference between the 1*l.* 16*s.* 4*d.* and the 1*l.* 7*s.* 6*d.*, the latter being the sum which the parties by contract fixed as "the average weekly amount which" the workman "is earning or is able to earn in some suitable employment or business after the accident" (Sched. I., par. 3), and was therefore the maximum sum which could be fixed if the average weekly amount above mentioned had been proved before an arbitrator, instead of being fixed by contract. The other stipulations of the agreement did not affect or relate to the money value of the compensation.

The workman, for reasons of his own, did not insist on the first stipulation of the agreement, and had not found it necessary to

insist on having work at which he could sit down. The employers had found him suitable work and had paid him his wages and the 8*s.* 10*d.* a week. He had not, in fact, earned so much as 1*l.* 7*s.* 6*d.* a week on the average, because he had not worked the full number of shifts on the basis of which his conventional earning capacity was arrived at. In November, 1916, having continued the weekly payments for three years, the employers applied to the county court judge that their liability therefor might be redeemed on the footing that the incapacity was permanent. This was resisted by the workman on the ground that the 8*s.* 10*d.* a week was not a "weekly payment" within par. 17 of Sched. I., and was therefore not subject to redemption except by agreement; and he further alleged that the incapacity was not "permanent" within the meaning of the paragraph.

The county court judge made an award in the following terms: "I find that the incapacity of the respondent is permanent to the extent at least of the weekly payment of 8*s.* 10*d.*, which has been paid for over three years. And I order that this payment be redeemed at the fixed rate, which it is agreed will mean a sum of 221*l.* 6*s.* But I make a declaration that that redemption is without prejudice to the continuing validity of the remaining terms of the agreement between the parties made in October, 1913, and also without prejudice to any further liability of the applicants to pay further compensation to the respondent, if at any time it should be found that the incapacity of the respondent has been diminished below the average weekly earning capacity of 1*l.* 7*s.* 6*d.* in consequence of the old injury. And I declare that the applicants are so liable accordingly, but subject to the proviso that any further liability of the applicants to pay compensation to the respondent shall not, even in the event of total incapacity, exceed the weekly sum of 9*s.* 4*d.*, being the difference between the original maximum weekly sum of 18*s.* 2*d.* and the weekly sum of 8*s.* 10*d.* (part thereof) hereby redeemed. And I order that applicants do pay to the respondent such of his costs of the proceedings down to the day of hearing and of his costs of the hearing as would be allowed on an unopposed application to redeem, and do also bear their own costs of such evidence as would have been necessary upon such an unopposed application; and that the respondent do pay to the applicants their

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costs of any further evidence (if any), and of any additional fees and costs which may be allowed in respect of a contested application, each bill of costs to be taxed by the registrar and one to be set off against the other."

The employers appealed from so much of the award as declared that the redemption was without prejudice to the continuing validity of the remaining terms of the agreement, and to any further liability of the employers as expressed in the award, and so far as it ordered them to pay costs.

There was a cross-appeal by the workman from the award so far as it ordered redemption.

A. Neilson, for the employers. The 8*s.* 10*d.* is a "weekly payment" within the meaning of par. 17 of Sched. I. to the Act (1), which the employers are entitled to redeem notwithstanding that it forms part only of the compensation to which the workman is entitled under the Act. It represents the difference between the 1*l.* 16*s.* 4*d.* a week which the workman was earning before the accident and the 1*l.* 7*s.* 6*d.* a week which he is now earning. It is therefore the full compensation to which the workman is entitled under Sched. I., par. 3. As no evidence was called by the workman it must be taken that his value in the market is 1*l.* 7*s.* 6*d.* a week.

A redemption under par. 17 must be final and complete, and there can be no subsequent review: *Calico Printers' Association* v. *Higham.* (2) The county court judge had therefore no jurisdiction to insert the declarations as to future liability in the award, and it is submitted that the Court ought to strike them out.

Further, the county court judge had no power to order costs against a successful applicant. [He also referred to *Marshall, Sons & Co.* v. *Prince.* (3)]

(1) Workmen's Compensation Act, 1906, Sched. I., par. 17: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, ..."

(2) [1912] 1 K. B. 93.

(3) [1914] 3 K. B. 1047.

H. T. Waddy and *W. Shakespeare*, for the workman. The 8*s.* 10*d.* is only part of the compensation to which the workman is entitled, and it is submitted, therefore, that the award ought to stand. It cannot be right that the employers should be entitled to redeem on the basis of that small weekly sum. Possibly a contention of the kind put forward on behalf of the employers was anticipated by Fletcher Moulton L.J. in *Calico Printers' Association* v. *Higham* (1), where he said: "Nothing is more common than for a workman to be taken back for light work by his employers, and to be paid liberal wages for it, the weekly payment being adjusted according thereto. It would be most unfair if the employer could, after paying such weekly amount for six months, apply for commutation, admitting that the incapacity was permanent, and demand that the sum should be fixed on an actuarial basis. After paying the commuted sum there would be no obligation on the employer to continue to employ the man at the wages previously given; and he might not be worth equally high wages in the labour market." It is not suggested in the present case that the employers would act otherwise than in accordance with their bargain, but there may be others who would not. Under par. 17 the only payment that can be redeemed is the sum fixed as the full compensation payable under the Act, which must be ascertained by having regard to the workman's present earning capacity in the open market. There can be only one basis of compensation, namely, the difference between the wage-earning capacity of the workman before the accident and his value in the labour market after it. The county court judge has not considered the value of the workman in the open market. There was no suggestion in the county court that the workman had a wage-earning capacity of 1*l.* 7*s.* 6*d.* outside his present employment. The county court judge has not determined whether the incapacity of the workman is permanent or not. Until this has been done it cannot be ascertained what is the compensation to which the workman is entitled under the schedule. The weekly payment of 8*s.* 10*d.* is part only of the compensation, and is not such a weekly payment as can be redeemed under par. 17 of Sched. I.

A. Neilson in reply. The words "weekly payment" in par. 17 mean the compensation to which the workman is entitled under the

(1) [1912] 1 K. B. 93, 101.

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Act. Here the workman was being paid 1*l.* 7*s.* 6*d.* a week. Before the accident he received 1*l.* 16*s.* 4*d.* a week. The weekly payment of 8*s.* 10*d.* therefore represents the compensation paid to him for his loss of earning capacity in the open market and is the sum which the employers are entitled to redeem under par. 17.

Cur. adv. vult.

June 19. The following written judgments were delivered :—

LORD COZENS-HARDY M.R. (1) This is an application by employers to redeem a " weekly payment " under par. 17 of Sched. I. to the Workmen's Compensation Act, 1906. The county court judge has allowed redemption, but has made a declaration of liability to pay further compensation in certain events. This award has not been supported by counsel on either side. I think it sufficient to say that the view of the learned judge is inconsistent with the plain language of the statute and with the decisions of this Court. A redemption under par. 17 must be final and complete. The award being set aside, there arises an important question whether the weekly payment is capable of being redeemed under par. 17.

The words " any weekly payment " seem to mean any weekly payment, ascertained by agreement or settled by arbitration, to which the workman is entitled under the Act by way of compensation. Under par. 3 of Sched. I., in fixing the amount of the weekly payment regard is to be had " to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." For example, the workman may have a weekly payment of x shillings, or may have a weekly payment of $x - y$ shillings representing the value of a cottage rent free worth y shillings, or, in other words, a reduced weekly payment of $x - y$. Par. 17 has no reference to anything, except to a weekly payment. I see no reason why either x or $x - y$ shall not be redeemed under par. 17.

The scheme of the Act is that every weekly payment may be reviewed under par. 16 of Sched. I. This right cannot be limited to the case in which the weekly payment is the sum total of the compensation agreed upon or awarded. The Act also provides by par. 17 that every weekly payment may be redeemed, but only on

(1) Read by Warrington L.J.

the application of the employer. This is a privilege conferred upon the employer. I think it applies to every weekly payment, which may be reviewed under par. 16. The combined operation of par. 16 and par. 17 enables a fair result to be obtained in most cases as between workman and employer. If the employer gives notice to redeem a weekly payment, which by change of circumstances has become too small, it may be possible to give the workman an opportunity to apply for a review under par. 16. If a review is granted, the application for redemption will fail. The county court judge ought, wherever possible, to keep such control over the proceedings as will enable him to secure that the weekly payment to be redeemed is correct. For example, in the instance given, if the employer has ceased to allow the use of the cottage rent free, it would be obviously unfair to redeem $x - y$ instead of x.

The facts of the present case are peculiar. The workman met with an accident in 1910. At that time his wages were 1*l.* 16*s.* 4*d.* a week. He received half wages—18*s.* 2*d.*—until 1913. Then an arrangement was made, the precise terms of which must be stated. [His Lordship referred to the terms of the agreement as appearing in the workman's answer, and continued:] The figures as to wages I take from the documents which passed in 1913. The result was that 8*s.* 10*d.* a week was the maximum sum which the man could claim under the Act. This sum has been regularly paid. In 1916 the employers sought to redeem the 8*s.* 10*d.* Now there is some ground for suggesting that the man has not been able to earn on an average 1*l.* 7*s.* 6*d.* If this is established to the satisfaction of the county court judge, he will probably review the 8*s.* 10*d.* by increasing it; and the weekly payment to be redeemed will be not 8*s.* 10*d.*, but the larger sum. There is a further point which will arise. Is the "incapacity" "permanent," in which case the county court judge has no discretion as to the amount; or is it not "permanent," in which case the county court judge is free to award such lump sum as, under all the circumstances, he may think fit? The meaning of "permanent" in this paragraph has been discussed in this Court.

What then ought to be done? In my opinion the employers are entitled to redeem prima facie the 8*s.* 10*d.*; but before making any such order the workman ought to be afforded an opportunity, if he so desires, of applying to review under par. 16. If no application to

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review is made, the county court judge must decide whether the "incapacity" is "permanent" or not. If an application to review is made, it should come on with the application to redeem.

It may be that Parliament may think it expedient to amend par. 17 so as to get rid of some of the difficulties I have indicated. In the meanwhile it is my duty to administer par. 17 as it stands.

As to costs, the workman's application fails and must be dismissed with costs. The employers' application in substance succeeds, and should be allowed, but without costs. All other costs should be left to be dealt with by the county court judge.

BANKES L.J. This appeal raises an important question on the construction of par. 17 of Sched. I. of the Workmen's Compensation Act, 1906. The learned county court judge, upon the employers' application, has made an order for redemption of the weekly sum paid by the employers to the workman; but he has accompanied the order by certain declarations, the effect of which is to render the redemption order subject to review. In my opinion this order cannot be supported. It is, I think, plain, upon the construction of the provisions of the Act and the schedule, that an order for redemption once made is final and conclusive, and extinguishes all claims of the workman to compensation for the particular injury in respect of which the weekly payment was made. So much, therefore, of the order of the county court judge as relates to the declarations must in any event be set aside.

There remains, however, the question raised by the workman's cross-appeal of whether the present is a case in which any order for redemption can be made. The contention of the workman is that the weekly payment which he was receiving from the employer was not such a weekly payment as is contemplated by par. 17 of Sched. I. to the Act. The point is an important one, and the question appears never to have been considered in this Court. The decision in *Marshall, Sons & Co.* v. *Prince* (1), which dealt with the case of the weekly payment made to an infant, is not applicable to the present case, as it was not in dispute in that case that the weekly payment made to the infant represented the full measure of the compensation to which he was entitled at the time of the application to redeem.

(1) [1914] 3 K. B. 1047

The compensation to which a workman is entitled under the Act in case of total or partial incapacity takes the form of a weekly payment, the amount of which depends partly upon the extent of the incapacity and partly upon the average weekly earnings before the accident. Sched. I. appears to recognize two classes of weekly payments—the one which represents in the form of a payment in cash the full measure of the compensation to which the workman is entitled, and the other in which the payment in cash represents something less than that full measure—because in fixing the amount of it regard has been had to some payment, allowance, or benefit which the workman may receive during the period of his incapacity (Sched. I., par. 3). As a simple instance of this second class, I take a case of a workman whose incapacity within the meaning of the schedule is permanent, and the amount of the compensation to which he is entitled is 20*s.* per week. In consideration, however, of being allowed to occupy a cottage worth 5*s.* a week rent free, the workman has agreed, so long as he is allowed to occupy the cottage, to accept a weekly payment of 15*s.* instead of the 20*s.*, to which, apart from the arrangement about the cottage, he would have been entitled. In the case I have put it will be noticed that there is no obligation upon the employer to continue the arrangement about the cottage during incapacity, or for any definite time. The provisions of par. 17 of the schedule, which provide for the redemption of a weekly payment, appear to me to be based upon the assumption that a payment of the lump sum therein indicated will represent the present money value of the full compensation to which the workman is entitled. This is the view taken by Fletcher Moulton L.J. in *Calico Printers' Association* v. *Higham* (1), where he says that, in exercising the jurisdiction conferred upon him by par. 17, the county court judge is merely putting in another form the compensation which the Act has already given to the workman. To allow the employer in the case I have just put to extinguish his liability to pay compensation to the workman by the payment of a lump sum calculated upon the basis of a weekly payment of 15*s.* would be a great injustice to the workman, for, having extinguished the liability, the employer could then immediately withdraw his permission to the workman to

(1) [1912] 1 K. B. 103.

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occupy his cottage any longer, and the workman would be without redress. It is quite true that par. 17 speaks of "any" weekly payment, and that the same expression is used in par. 16, where it must obviously be read in its widest sense as including both the classes of weekly payment to which I have already referred. To give the expression the same meaning in par. 17 would be, in my opinion, to defeat the obvious intention of the Legislature. Under these circumstances it is, I think, not only permissible, but necessary, to put upon these words a narrower construction, if any such construction can be found which will carry out that intention. Under these circumstances the expression "weekly payment" in par. 17 should, in my opinion, be confined to the first class of weekly payment to which I have referred—that is to say, to one where the cash payment represents the full measure of the compensation to which the workman is entitled. It appears to me that the difficulty which I see in the way of giving the wider interpretation to the words "any weekly payment" is not got over by giving the workman an opportunity of applying to review before dealing with the employers' application to redeem. Instead of the simple case I have already taken as an illustration I will assume the arrangement between the employer and workman to have been that the workman should not only have been entitled to occupy the cottage rent free, but that he should have been entitled to six months' notice to quit. What would the position be if the employer, without having given the workman any notice, applied for an order to redeem? If the workman was offered the opportunity of applying to review, might he not reply: "I desire to remain in the cottage, and I am entitled to do so until the expiration of any notice my employers may give me. I do not desire any review at present, and am not prepared to apply for a review, unless and until I am under an obligation to leave the cottage." What is the county court judge to do under these circumstances? Is he bound to make an order giving the employer leave to redeem at a sum which must be considerably less than the present money value of the full compensation to which the workman would be entitled under the Act had he not agreed to accept a tenancy of the cottage in temporary reduction of the full money payment due to him? In my opinion the county court judge must, under the circumstances I have put, be entitled to refuse to make any order

to redeem. In many cases a convenient course no doubt would be for the county court judge to allow either party, if he desired it, the opportunity to apply for a review, and to adjourn the application to redeem if either party did so desire. It is, however, in my opinion, entirely in the discretion of the county court judge which course he shall adopt.

Applying my view of the law to the present appeal, the position appears to be as follows: The case must go back to the county court judge to decide whether the weekly payment is one which entitled the employer to an order to redeem; and if it is, whether the incapacity of the workman is permanent. Upon the first question I express no opinion, except to say that it is not clear upon the evidence whether the workman was capable of earning the full 27*s.* 6*d.* referred to in the agreement. If the county court judge decides the first question in the negative, then he will decide whether to adjourn the application or to dismiss it; and that will depend to some extent upon whether either party applies for an opportunity to make an application to review.

With regard to the appeals, neither, in my opinion, succeeds entirely; and I think that this Court should make no order upon the appeals except that the award should be set aside, and the case should be remitted to the county court, and that neither party should have any costs here or below.

As the other members of the Court take a different view as to the construction of par. 17, I naturally express my opinion with considerable hesitation, although I think it receives some measure of support from what Fletcher Moulton L.J. said in *Calico Printers' Association*, v. *Higham* (1), where he discussed the position of a workman under par. 17, who, instead of receiving the full compensation to which he was entitled in the form of a weekly payment, was receiving part of it in the form of a weekly wage for light work, which was higher than the market value of that work.

WARRINGTON L.J. stated the facts as above set out and continued: As to the employers' appeal, I think it ought to succeed. The declaration as to the remaining terms of the agreement is, in my opinion, unnecessary, as will appear presently, and the judge had no

(1) [1912] 1 K. B. 101.

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jurisdiction to make it. The other declaration is, in my opinion, founded on a misconception of the meaning and effect of par. 17. This, in my opinion, contemplates a redemption once for all, and not one subject to review. At the same time the award directing redemption of the 8*s*. 10*d*. by payment of 221*l*. 6*s*. cannot stand. inasmuch as the judge has not determined whether the incapacity is permanent or not.

The order as to costs was made, not in exercise of discretion, but in supposed obedience to the rules followed in actions for redemption of mortgages in the Chancery Division. In such actions, where redemption is opposed altogether, the mortgagee may either be deprived of costs up to trial or may be—more frequently is—ordered to pay them ; but never, so far as I am aware, is the mortgagor who succeeds, in spite of opposition, in obtaining a judgment for redemption ordered to pay any of the mortgagee's costs up to judgment : see *Credland* v. *Potter* (1) and *Hall* v. *Heward*. (2) The result, so far, is that the present award must be discharged.

The real question, and a very difficult one, is raised by the workman's appeal—namely, is the 8*s*. 10*d*. a week in this case capable of redemption under par. 17 ? The workman contends that it is not, because he says that par. 17 is applicable only to a weekly payment which constitutes the whole of the compensation, and not where the liability to pay it is derived from an agreement containing other stipulations for his benefit, or from an award which, in fixing the weekly payment, takes into account other benefits which the workman receives—at any rate, if such benefit is of a precarious nature. This is a question of construction, and I proceed to deal with it as such.

The Act provides, in the case of an accident causing total or partial incapacity for work, compensation in the form of a weekly payment, and contemplates that the amount of that payment may be ascertained either by agreement between the parties or in default of agreement by arbitration as provided by the Act : see s. 1, sub-s. 3. I can find no distinction for the present purpose between compensation ascertained in the one way and compensation ascertained in the other. If, therefore, the workman is right, and the provision for redemption is limited as he contends it is, such limitation must

(1) (1874) L. R. 10 Ch. 8, 13. (2) (1886) 32 Ch. D. 430, 435, 436.

apply as much to a weekly payment ascertained by an award as to one ascertained by agreement.

The "weekly payment" in par. 17 must, of course, be a weekly payment payable by way of compensation for injury, that being the only kind of weekly payment with which the Act is concerned. In the present case the 8*s*. 10*d*. clearly fulfils this condition. It is so called in the agreement, and in fact it is arrived at by a comparison between the man's average earnings before the injury and the average weekly amount he is by convention able to earn at the agreed occupation and at the agreed rate of wages. Does the Act require that the weekly payment should fulfil the further condition of being in itself the full measure of the man's incapacity? I cannot think that it does. Par. 3 of Sched. I. provides that, "in fixing the amount of the weekly payment, regard is to be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." In other words, it contemplates that the weekly payment by itself may not be the measure of the incapacity; and yet the other paragraphs of the schedule make no distinction between a weekly payment so ascertained and one by itself representing full compensation, there being no payment, allowance, or benefit to be taken into account. It can hardly, I think, be contended that a weekly payment such as that in the present case is not within the provisions of pars. 7, 14, 16, 18, and 19 of Sched. I., and, if so, I can see no good reason for excluding it from par. 17. It is true that the weekly payment mentioned in par. 1 (*b*) of Sched. I. is the full measure of compensation; but the amount of this payment is to be determined by the application of the provisions of par. 3, and when this has been done the sum so ascertained is the weekly payment which, in the words of the schedule, is the amount of compensation under the Act. To adopt the contention of the workman in this case seems to me to involve giving a special limitation to the expression "weekly payment" where it occurs in par. 17, and thus to give to it a different meaning to that which it bears in other parts of the schedule. I do not deny that in some cases such a construction may be necessary in order to arrive at a rational result, but I cannot find such necessity in this case. The true legal position appears to me to be this—that the parties have entered into an agreement, one of the terms of which is that a

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weekly payment shall be made which is by statute liable to alteration on review, and also liable to be redeemed on payment of a capital sum, which, when ascertained in accordance with the statute, is to be regarded as the statutory equivalent for the weekly payment. The redemption of the weekly payment effects a substitution of one kind of liability for another, but in no way affects the remaining stipulations of the agreement. The position of the parties is, in my opinion, precisely the same as if the parties had in the agreement itself expressly provided for redemption of the weekly payment. Much of the hardship apparently imposed on the workman by taking this view may be obviated by a recourse to par. 16. If at any time before it has been redeemed the workman conceives that the weekly payment, having regard to the then state of circumstances, is not adequate in amount as compensation, he can apply under par. 16 for review, for it is as much a quality of the payment that it is capable of review as that it is liable to redemption. The judge would properly deal with such an application before dealing with an application for redemption, and if he should see fit to alter the weekly payment the application for redemption of the original one would necessarily fall to the ground, as there would be no liability capable of redemption, such altered payment not having continued for six months. So, also, if without an application to review the workman satisfies the judge that the incapacity is not permanent—that is, not stable or constant: see *Marshall, Sons & Co.* v. *Prince* (1)—the judge is not bound to allow redemption on payment of the sum ascertained as provided by the statute, but is left free to assess the sum to be paid on such footing as he may think fit: see also *Calico Printers' Association* v. *Higham*. (2) In truth, the lump sum payable on redemption is, when properly ascertained, the equivalent of the weekly payment, in redemption of which it is paid; and care is taken that when the redemption is effected by agreement the judge is to be satisfied that the sum to be paid is an adequate sum: Sched. II., par. 9.

The view I feel compelled to adopt on the construction of the Act may in some cases involve some hardship on the workman, not sufficiently met in the way I have suggested; but, if so, the matter can, in my opinion, be put right by legislation. On the whole,

(1) [1914] 3 K. B. 1047. (2) [1912] 1 K. B. 93.

therefore, I think the judge was right in treating the weekly payment as being within par. 17, and therefore capable of redemption, but that he ought to have determined whether the "incapacity" was permanent in the sense above mentioned; and if he came to the conclusion that it was not, then to have awarded such lump sum as he thought fit. In my opinion, therefore, the present award ought to be discharged, and the application of the employers remitted to the county court judge for adjudication on the footing that the defence of the workman on the ground that the weekly payment is not within par. 17 fails. The costs of the further hearing and of the original hearing will be dealt with by the judge, subject to the opinion I have expressed as to principle. As to the appeals, I think that of the employers' should be allowed and that of the workman dismissed. The latter appeal fails altogether, and should, I think, be dismissed with costs. The employers' appeal only partially succeeds, inasmuch as the order for redemption on payment of 221*l.* 6*s.* does not stand. I think each party should bear his own costs of this appeal.

Solicitors: *Barlow, Barlow & Lyde, for Wilmshurst & Stones, Huddersfield; Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

W. I. C.

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June 19.

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Army—Military Service—Certificate of Exemption—Attainment of Age of Forty-one during Currency of Certificate—Liability to be subsequently called up for Service—Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *s.* 2, *Sched. I., clause* 6—*Military Service Act*, 1916 (*Session* 2) (6 & 7 *Geo.* 5, *c.* 15), *s.* 1, *sub-s.* 1.

By s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), "Every male British subject who . . . . for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he . . . . is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916, ... be deemed as from the appointed date to have been duly enlisted . . . . The appointed date shall, as respects men who come within the operation of this section on the passing of this Act, be the thirtieth day after the date of the passing of this Act . . . ." Amongst the exceptions set out in the First Schedule to the Military Service Act, 1916, are "men who hold a certificate of exemption under this Act for the time being in force." By s. 3, sub-s. 3, of the Military Service Act, 1916, as amended by s. 6 of the Military Service Act, 1916 (Session 2), "Where a certificate of exemption ceases to be in force owing to . . . . the expiration of the time for which the certificate was granted, the man to whom the certificate was granted shall, as from the expiration of two weeks after the date on which the certificate so ceases to be in force, be deemed to have been enlisted and transferred to the reserve in the same manner as if no such certificate had been granted unless in the meantime the man has obtained a renewal of his certificate." Sub-s. 5: "Where an application has been made by or in respect of any man for a certificate of exemption or for a renewal of such a certificate, he shall not be called up for service with the colours until the application has been finally disposed of."

The appellant, who was between the ages of eighteen and forty-one at the time the Act of 1916 (Session 2) was passed (May 25, 1916), applied for a certificate of exemption before the appointed date, which in his case was June 24, 1916. The certificate was granted and was subsequently extended to January 1, 1917, when (the appellant not having applied for any further extension) it ceased to be in force. In November, 1916, the appellant had attained the age of forty-one. In March, 1917, he was called up for service:—

Held, that, although at the date he was called up for service he had attained forty-one years of age, he was nevertheless liable to serve, inasmuch as the effect of the statutes was that, not having attained forty-one years of age at the appointed date, he was as

from the passing of the Act of 1916 (Session 2) within its operation, and was only exempt from service so long as a certificate of exemption (which he was unable to produce) was "for the time being" (i.e., at the time the question between him and the military authorities arose) in force, or until an application for its renewal had been finally disposed of.

CASE stated by a metropolitan magistrate.

An information was preferred by the respondent, Second-Lieutenant N. H. Cope, against the appellant, Ridout, for that he, the appellant, having been called out on permanent service, did unlawfully, and without leave lawfully granted, fail to appear on March 7, 1917, in accordance with a notice duly served upon him.

The appellant was on the date of the passing of the Military Service Act, 1916 (Session 2) (May 25, 1916), between the ages of eighteen and forty-one, unattested, married, a British subject, and ordinarily resident in Great Britain. Before June 24, 1916, he made application for exemption from military service to the Lambeth tribunal in accordance with the provisions of the Military Service Acts. (1) On September 14, 1916, the tribunal heard the application and granted him exemption, which was renewed until January 1, 1917. On November 29, 1916, the appellant became forty-one years of age. He was called up from the reserve for service on March 7, 1917.

It was contended before the magistrate that, although the appellant was of military age and liable for military service at the time of his application to the tribunal for exemption, he ceased to be of military age before the period of exemption then given him had expired, and before he was in fact called up for service on March 7, 1917.

The magistrate decided against this contention and convicted the appellant.

The question for the opinion of the Court was whether the magistrate was right in so doing.

Compston, K.C., and *Hawkin*, for the appellant. The appellant was not liable on the expiration of his period of exemption to be called up. The effect of s. 2, sub-s. 1, coupled with s. 3, sub-ss. 3

(1) See note on p. 716, post.

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and 5, of the Military Service Act, 1916, is that when a man makes an application for exemption he is not liable to be called up for service until the application is finally disposed of, and the moment his application is granted he is within clause 6 of the exceptions contained in the First Schedule to the Act. The appellant was therefore not deemed to be enlisted until two months (reduced to two weeks by s. 6 of the Military Service Act, 1916 (Session 2), after his exemption expired, and at that date he was over forty-one years of age. He therefore never came within the operation of the Military Service Act, 1916 (Session 2), for when a certificate of exemption is granted it relates back, by virtue of s. 3, sub-s. 5, of the principal Act (which is by s. 17 of the Act of 1916 (Session 2) to be read together with that Act), to the date of the application, which was made before the appointed day. Therefore upon the appointed day he was exempt from the provisions of the Act of 1916 (Session 2), and when the exemption expired he was over forty-one and therefore never came within the operation of the statute. The words "for the time being" mean at the time in question. If at the time the Act of 1916 (Session 2) was passed a man was between eighteen and forty-one years of age he was deemed to be enlisted as from the appointed date, but if he was only seventeen he will be deemed to be enlisted when he attains eighteen years of age. There is no distinction between being liable to be called up for service and being liable to serve. [*Fraser* v. *Military Authorities* (1) was also referred to.]

Bransom, for the respondent. The magistrate was right. The appellant had not attained forty-one years of age before the appointed date. He was therefore within the operation of the Military Service Act, 1916 (Session 2), from the date of its passing, although his liability to serve was suspended from the date of his application for his certificate of exemption (which it is true was made before the appointed date) for so long as the certificate remained in force. The words "for the time being" mean at the relevant time, and that time in the appellant's case was the time he was called upon to serve, and as at that time his certificate of exemption was not in force he was not within clause 6 of the exceptions contained in the First Schedule of the Military Service Act, 1916: *Fraser* v. *Military Authorities*. (1) The meaning of s. 2 of the Military Service Act,

(1) [1917] W. N. 147; 116 L. T. 447.

1916, is that the man is within the operation of the Act, but he is not liable to service while his certificate of exemption is in force. There would have been no need for the provision in s. 3, sub-s. 5, of the Military Service Act, 1916, that a man who has made an application for a certificate of exemption should not be liable to be called up until his application is finally disposed of if he was not deemed to be enlisted.

Compston, K.C., replied.

VISCOUNT READING C.J. The interesting and somewhat difficult question which arises in this case is whether the appellant, who at the time of the passing of the Military Service Act, 1916 (Session 2), had not attained the age of forty-one, and therefore from the "appointed date" was liable to military service unless he held or had applied for a certificate of exemption, and who before the appointed date applied for a certificate of exemption, which was granted in September, 1916, and was in force when and after he attained the age of forty-one years, is nevertheless liable to serve. The Military Service Act, 1916 (Session 2), came into operation on May 25, 1916. When it came into operation it admittedly applied to the appellant, because he was between the ages of eighteen and forty-one. He did not come within any of the exceptions in the First Schedule to the Military Service Act, 1916, until he had applied for and obtained a certificate of exemption, when he came within the sixth exception in that schedule. In an ordinary case the appointed date under the Military Service Act, 1916 (Session 2), was June 24, 1916, i.e., thirty days after the statute came into operation. That is not the appointed date for every person or class of person, but by s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), it was the appointed date for those men who came within the operation of the section on the passing of the Act. In October, 1916, an application was made for renewal of the certificate, which had been granted in the previous September, and the renewal was granted until January 1, 1917. During the currency of that certificate of exemption, i.e., on November 29, 1916, he became forty-one years of age, and consequently when the certificate ceased to be in force he had attained the age of forty-one years. No further application was made for a certificate, and no certificate

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of exemption was granted from that date. On March 7, 1917, the military authorities called him up from the reserve for service. The answer which he, in effect, makes is, "When the military authorities called me up I had attained the age of forty-one years, and consequently I was not a person compellable to serve, and was not within the operation of the Military Service Act, 1916 (Session 2), and therefore the military authorities were wrong in calling me up for service."

The question, which is not free from complication, turns upon the statutes. By s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), it is enacted that "every male British subject, who has at any time since August 14, 1915, been, or for the time being is, ordinarily resident in Great Britain, and who for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall . . . ."—I omit what I may call the parenthesis which follows—"be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces . . . ." Those words, standing alone, would apply to the appellant. But on his behalf it is contended that he comes within what I have described as the parenthesis, which is in the following words: "unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916, ... or has attained the age of forty-one years before the appointed date." At the time the Military Service Act, 1916 (Session 2), came into force, the appellant, being within it, applied for exemption and obtained it. He now claims that he comes within clause 6 of the exceptions in the First Schedule to the Military Service Act, 1916, and is therefore not liable to be called up for service. The difficulty in his way is that when called upon to serve he was not a man who held "a certificate of exemption under this Act for the time being in force," because his exemption had expired on January 1, 1917, and he was not called up for service until March 7, 1917. Therefore when he was called up he could not produce a certificate of exemption in force. Had he been able to do so clause 6 of the exceptions would have applied.

In order to meet that difficulty Mr. Compston on his behalf has contended that it was unnecessary for the appellant to obtain a further extension of the certificate of exemption, although it had

expired on January 1, 1917, upon the ground that he was not a person duly enlisted; and in support of that contention he relied in substance upon the language of s. 2, and s. 3, sub-s. 3, of the Military Service Act, 1916. He contended that, notwithstanding that the appellant was within the Military Service Act, 1916 (Session 2), when it was passed, immediately he obtained exemption he was by virtue of s. 2 of the Military Service Act, 1916, exempt from the provisions of the Military Service Act, 1916 (Session 2), and therefore upon the true construction of the Act the appellant must be considered as being in the same position as if he had never been within it. In further support of that contention Mr. Compston relied on the language of s. 3, sub-s. 3, of the Military Service Act, 1916, which (as amended by s. 6 of the Military Service Act, 1916 (Session 2)) provides that at the expiration of two weeks after the date on which the certificate ceases to be in force the man to whom it was granted shall be deemed to have been enlisted and transferred to the reserve in the same manner as if no such certificate had been granted. He contended that the effect of those sections read together, having in view the scope of the two statutes, is that, notwithstanding that the appellant is prima facie within the operation of the Military Service Act, 1916 (Session 2), he is, nevertheless excluded from it by the exemption conferred upon him by the certificate which he obtained, and that in law he did not come within the Act of 1916 (Session 2) until two weeks after the certificate had expired. As the certificate expired on January 1, 1917, and two weeks thereafter was January 15, 1917, he contends that that is the earliest date at which the appellant can be considered as having come under the Military Service Act, 1916 (Session 2), and that he cannot be deemed to have been enlisted as from that date because he was then over forty-one years of age. On behalf of the respondent it was contended that the appellant was within the operation of the Military Service Act, 1916 (Session 2), as soon as it was passed, but that he was exempt from the obligations imposed by the statute so long as he held a certificate of exemption; that when the certificate of exemption ceased to have any force there was no exception upon which he could rely, and that the result is that he is simply a man who was eighteen years of age and had not attained forty-one years of age

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when the Act came into operation, and is consequently liable to service.

I have come to the conclusion that the contention on behalf of the respondent is sound, and that the effect of the two statutes is that a man who is eighteen but not forty-one years of age on the appointed date is deemed as from that date to be enlisted; but so long as a certificate of exemption is in force, or there is an application for a renewal of the certificate which has not been yet dealt with, he is exempted from complying with the provisions of the Act. In my judgment the words of s. 2 of the Military Service Act, 1916, cannot be read as having the effect that he is to be treated as if he had never come under the Military Service Act, 1916 (Session 2). If it were possible to place that meaning upon the words I should agree with the argument on behalf of the appellant, but I can only read them as meaning that when a man has made an application for and obtained a certificate of exemption under the Military Service Act, 1916, and during the period that the certificate has all the force given to it under that Act, the obligations imposed upon him cannot be enforced so long as he has the benefit of the period of exemption which is certified by the tribunal. The certificate is a complete answer to any call that may be made upon him for military service, but it is only an answer so long as the certificate of exemption is in force, or an application for renewal has been made which is given the same effect by s. 3, sub-s. 5, of the Military Service Act, 1916.

The words "the appointed date" and "for the time being" are material, because the ground of exemption upon which the appellant has to rely only applies to a man who in the words of s. 1, sub-s. 1, of the Act of 1916 (Session 2) is "for the time being" within the exceptions set out in the First Schedule to the Military Service Act, 1916. If the words "for the time being" mean at the time the question arises between the military authorities and the person called up for service, the only question is whether at that time the person called up can produce his certificate or has made an application for its renewal. That that is the true meaning of those words has already been decided in this Court in *Fraser* v. *Military Authorities*. (1) In that case an officer was called up for service under the

(1) [1917] W. N. 147; 116 L. T. 447.

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Act of 1916 (Session 2) after he had ceased to be an officer. When the Act came into force he was an officer, and therefore was within the exceptions contained in the First Schedule to the Military Service Act, 1916, and consequently could not be called upon to serve under the Act of 1916 (Session 2); but when he was no longer serving with His Majesty's regular or reserve forces, and the period during which the exemption lasted had terminated, the question arose whether the exception from liability to military service still applied. This Court decided that the exception no longer applied, because the words "for the time being" must be read as if they meant not at the date of the passing of the Act of 1916 (Session 2), but at the date the question arose between the person and the military authorities. That being so, the only question for the Court was whether, when called upon to serve, the person who had been an officer could bring himself within the exception and as he could not the Court held he was liable to serve.

In the present case the same reasoning must be applied and the same meaning attributed to the words, and the conclusion, therefore, at which I arrive is that the appellant was liable because he could not bring himself within the exception contained in clause 6 at the time the question arose between him and the military authorities. The result is that the magistrate was right and the appeal must be dismissed.

DARLING J. I have arrived at the same conclusion, but not without very considerable difficulty. It is necessary to consider two very recent statutes, and their language is, to say the least, obscure; indeed, in some passages it would seem that the draftsman, in altering his language in the course of the Bill passing into law, acted upon the adage that language was given to man to enable him to conceal his thoughts. Having given the statutes the best consideration I can, I have come to the conclusion that their effect is that with regard to male British subjects, under the age of eighteen there was on the passing of the Act of 1916 (Session 2) entire exemption from military service, but they might become liable to serve as they arrived at the age of eighteen. With regard to men of forty-one there was exemption from military service in certain circumstances—namely, if the man had attained the age

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of forty-one years before the appointed date, i.e., by s. 1, sub-s. 1, of the Act of 1916 (Session 2), before thirty days after the passing of the Act, which took place on May 25, 1916. So that a man who had before June 24, 1916, attained the age of forty-one was exempt from the operation of the Act altogether.

But there were certain men between the ages of eighteen and forty-one who might become exempt for a time from the operation of the Act, namely, any man who for the time being was within the exceptions set out in the First Schedule to the Military Service Act, 1916, as amended by the Act of 1916 (Session 2), or any subsequent enactment, and it was sought to show that the appellant came within those exceptions. In my judgment he did not. At the time he was called upon by the military authorities for service he did not come within the exceptions; and I entirely agree with the reasons which have been given by my Lord, and which I need not repeat. It seems to me that the appellant at the time he was called upon for service did not rely on the contention that he was excused because he held a certificate for the time being in force, but upon the fact that he had attained the age of forty-one. But that was not enough. There is no general exception for all men who have attained the age of forty-one. He had not attained the age of forty-one before the appointed date, namely, June 24, 1916, and he seems to have been under the false impression that he was excused altogether merely because he had attained forty-one years of age. He appears not to have noticed the words in the Act of 1916 (Session 2) which make it necessary that he should have attained that age before the appointed date. Upon his behalf the words in s. 1, sub-s. 1, of the Act of 1916 (Session 2), "unless he . . . . is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916," were relied on. But the appellant was not for the time being within any exception. "The time being" was when the military called upon him for service, and at that time his certificate of exemption was no longer in force. He is therefore not within any exemption given by either of the statutes.

AVORY J. I am of opinion that the decision of the magistrate was right, on the short ground that at the date when the Military

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Service Act, 1916 (Session 2), came into force, namely, on May 25, 1916, the appellant was a male British subject ordinarily resident in Great Britain and between the ages of eighteen and forty-one. That being so, he comes within the operation of the section, and the appointed date with regard to him was therefore June 24, 1916. The effect of s. 1, sub-s. 1, of the Act is that on June 24, 1916, he was deemed to have been duly enlisted in His Majesty's regular forces unless he could show that he for the time being was within the exceptions set out in the First Schedule to the Military Service Act, 1916. Whether the words "for the time being" should be construed as meaning the time at which he otherwise would come within the operation of the Act upon its passing, or as meaning, as I think it does, the time at which the question of his liability to serve arises—that is to say, the time when the military authority calls him up for service—it is equally clear that at neither of those dates was he within the exception contained in clause 6 of the First Schedule to the Military Service Act, 1916, because at neither of those dates did he hold a certificate of exemption for the time being. On that short ground I think the magistrate was right, it being quite plain that the only point taken before him was that the mere fact of the applicant having attained the age of forty-one after he became subject to the operation of the Act was sufficient to exempt him. It did not exempt him any more than it would exempt a man who had been called up to the colours and subsequently attained forty-one years of age.

Hawkin. The result is that the appellant must, in the absence of further order, be handed over to the military authorities. I ask for a stay with the view to a possible appeal. By the Military Service Act, 1916, s. 1, sub-s. 2 (*a*), the question of any alleged failure by a man to comply with an order calling him up shall be decided only on proceedings before a civil Court. The decision in *Southwark and Vauxhall Water Co.* v. *Hampton Urban Council* (1) that an appeal lies is applicable.

VISCOUNT READING C.J. That was a different case altogether. If the present case is a criminal one there is no appeal.

(1) [1899] 1 Q. B. 273.

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AVORY J. In s. 1, sub-s. 2 (*a*), of the Military Service Act, 1916, a civil Court is not distinguished from a criminal but from a military Court.

Appeal dismissed. Stay of proceedings refused.

Solicitors for appellant: *Ballantyne, Clifford & Hett.*
Solicitor for respondent: *The Treasury Solicitor.*

NOTE.—Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), s. 2, sub-s. 1: "An application may be made at any time before the appointed date to the local tribunal established under this Act by or in respect of any man for the issue to him of a certificate of exemption from the provisions of this Act . . . ."

Sect. 3, sub-s. 3: "Where a certificate of exemption ceases to be in force owing to the withdrawal of the certificate or the failure to comply with the conditions on which the certificate was granted or the expiration of the time for which the certificate was granted, the man to whom the certificate was granted shall, as from the expiration of two months after the date on which the certificate so ceases to be in force, be deemed to have been enlisted and transferred to the reserve in the same manner as if no such certificate had been granted unless in the meantime the man has obtained a renewal of his certificate."

Sub-s. 5: "Where an application has been made by or in respect of any man for a certificate of exemption or for a renewal of such a certificate, he shall not be called up for service with the colours until the application has been finally disposed of."

FIRST SCHEDULE.

Exceptions.

Clause 6: "Men who hold a certificate of exemption under this Act for the time being in force . . . ."

Military Service Act, 1916 (Session 2) (6 & 7 Geo. 5, c. 15), s. 1, sub-s. 1: "Every male British subject who has at any time since the fourteenth day of August nineteen hundred and fifteen been, or for the time being is, ordinarily resident in Great Britain, and who for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916 (in this Act referred to as the principal Act), as amended by this Act or any subsequent enactment, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve: . . . .

"The appointed date shall, as respects men who come within the operation of this section on the passing of this Act, be the thirtieth day

after the date of the passing of this Act, and, as respects men who come within the operation of this section after the passing of this Act, be the thirtieth day after the date on which they so come within the operation of this section."

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Sect. 6: "Sub-section (3.) of section three of the principal Act shall, as respects certificates which cease to be in force after the date of the passing of this Act . . . . be construed as if 'two weeks' were substituted for 'two months,' and as if the words 'unless in the meantime the man has made an application for a renewal of his certificate' were substituted for the words 'unless in the meantime the man has obtained a renewal of his certificate.'"

J. E. A.

[IN THE COURT OF APPEAL.]

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July 5, 6, 27,

In re AN ARBITRATION BETWEEN THE NEW ZEALAND SHIPPING COMPANY, LIMITED, AND THE SOCIETE DES ATELIERS ET CHANTIERS DE FRANCE.

Contract—Contract to be "void" in a certain Event—Void or voidable—Rule that a Party cannot take Advantage of his own Wrong.

By a contract made in 1913 a French company (called the builders) agreed to construct a steamer for a shipping company (called the purchasers) to be completed by January 30, 1915, subject to an extension of time if the construction was delayed by an unpreventable cause beyond the control of the builders; and in case the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European war, eighteen months from the date agreed by the contract for completion "thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them with interest accrued thereupon at 5%."

The steamer was in course of construction when on August 2, 1914, France became engaged in a European war, and had ever since continued to be so engaged; and the builders had been prevented by unpreventable causes beyond their control from completing the steamer by January 30, 1915, and had ever since been prevented by the same causes. The eighteen months expired on July 30, 1916, and the builders contended that the contract thereupon became void, and that the purchasers were only entitled to the repayment of the moneys paid by them with interest thereon. The purchasers contended that the contract became voidable only at their option:—

Held, that the contract became void and not merely voidable at the option of the purchasers, and that as the avoidance of the

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contract had not been brought about by any wrongful act or default on the part of the builders the latter were not prevented from alleging that the contract was void.

Where a contract contains a provision that it shall become void in a certain event, on the happening of that event the contract becomes void; but, unless it clearly provides to the contrary, the contract is subject to a condition or proviso that a party shall not take advantage of his own wrong, and therefore a party whose wrongful act or default has brought about the avoidance of the contract cannot allege its invalidity.

APPEAL from the judgment of Bailhache J. upon an award stated by an umpire in the form of a special case.

By an agreement made on March 6, 1913, between the New Zealand Shipping Company, Limited (called "the purchasers"), and the Société des Ateliers et Chantiers de France (called "the builders") the builders agreed to construct for the purchasers a steamer upon the terms and conditions therein mentioned.

The agreement was executed in English and in French, and it contained the following clauses:—

3. The price of the steamer was to be 98,450*l.* on delivery in accordance with the contract, the said sum to be paid by instalments as the work progressed.

5. "The said steamer unless the construction thereof shall be delayed by fire, strike or lock-out of workmen, or any other unpreventable cause beyond the control of the builders (in which case a fair proportionate extension of time shall be allowed) shall be completed ready for trial by the 30th October, 1914, and delivered afloat as usual in the port of Dunkirk free of dock and other dues as soon as such trial has been completed to the satisfaction of the purchasers or their representatives."

7. "In the event of the said vessel not being completed and ready for trial on or before 30th October, 1914, or in the event of such trial not proving satisfactory as aforesaid the builders undertake to pay the purchasers as liquidated damages the sum of 10*l.* per working day for each working day during which such delivery may be delayed beyond the 30th October, 1914, unless such delay is due to any of the causes specified in clause 5 hereof. . . . ."

9. "The builders shall be responsible for all risks to the said steamer and to any part or parts thereof while in course of con-

struction and during the trial down to the date of actual delivery of the said steamer to the purchasers."

12. "In case the builders become bankrupt or insolvent or shall fail or be unable to deliver the steamer within eight months from the date agreed by this contract (1), thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them with interest accrued thereupon at 5% and that without being necessary for the purchasers to take any legal action for the recovery of this money. The builders will hand to the purchasers the guarantee of a bank who will undertake to repay this money in the event of its becoming due as stated above. Except only in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all."

13. In case any dispute or difference should arise between the parties the same was to be referred to arbitration in London.

In consequence of alterations in the design of the vessel the parties subsequently agreed that January 30, 1915, should be substituted for October 30, 1914, as the date by which the vessel was to be completed ready for trial.

The vessel was in course of construction when on August 2, 1914, France became engaged in a European war, and had ever since continued to be so engaged.

The builders were prevented by unpreventable causes beyond their control within the meaning of clause 5 from completing the vessel ready for trial by January 30, 1915, and had ever since been prevented by the same causes.

Disputes arose between the parties (*a*) as to when the eighteen months under clause 12 would expire; and (*b*) as to whether in the event of the said period expiring before the builders could deliver the vessel afloat as provided by the contract the builders were entitled to treat the contract as null and void notwithstanding that the purchasers required the builders to complete and deliver the vessel and did not claim to consider the contract null and void.

(1) In the French version the words were: "En cas de faillite ou d'insolvabilité des constructeurs, ou de leur refus ou impossibilité de livrer le vapeur, dans les huit mois suivant la date de livraison fixée par ce contrat."

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It was contended for the builders as to (*a*) that the eighteen months expired on July 30, 1916; and as to (*b*) that upon such expiration the contract became void and at an end except for the repayment to the purchasers of the moneys paid by them under clause 3 of the contract.

It was contended for the purchasers as to (*a*) that the several periods limited by clause 12, including the period of eighteen months, did not begin to run until the builders were in default, and the builders not yet having been in default the eighteen months had not begun to run; and as to (*b*) that in any case the contract did not become void at the expiration of the period limited, but was voidable at the option of the purchasers, who continued to be entitled to require the builders to perform it within the contract time as extended by the operation of the causes specified in clause 5 of the contract.

Subject to the opinion of the Court the umpire decided and awarded as to (*a*) that the eighteen months mentioned in clause 12 of the contract expired on July 30, 1916; and as to (*b*) that the builders in the events which had happened were entitled to treat the contract as null and void except for the repayment with interest at 5 per cent. of all moneys already paid to the builders by the purchasers.

The question for the opinion of the Court was whether the umpire was right in his award.

Bailhache J. held, first, that the eighteen months expired on July 30, 1916; and, secondly, that the contract then became void and not merely voidable at the option of the purchasers, and that the builders, who had not brought about the avoidance of the contract by a breach of contract on their part, were entitled to rely on its avoidance. He accordingly affirmed the award.

The purchasers appealed.

Leck, K.C., and *Roche*, K.C. (*Simey* with them), for the purchasers. Upon the construction of the contract "the date agreed by this contract," as specified in clause 12, has not arrived. The date is to be ascertained under clause 5, and is not a fixed date. In case the construction of the steamer is delayed by an unpreventable cause, there is to be a "fair proportionate extension of time,"

and the eighteen months in case of war will not begin to run until after that extension of time.

Secondly, if January 30, 1915, is the date "agreed by this contract," the contract did not become void at the expiration of eighteen months from that date, but became voidable only at the option of the purchasers. Clause 12 is for the protection of the purchasers, the object being to secure in certain events repayment to them of the moneys paid to the builders, and the purchasers alone can declare the contract at an end. It could not have been intended that the builders could by their own default or wilful refusal to carry out the contract bring about the avoidance of the contract. The word "void" must have the same construction where there is no default on either side. A proviso in a lease of coal mines reserving a royalty rent that the lease "shall be deemed void to all intents and purposes" if the tenant should cease working the coal has been held to mean that the lease was voidable at the option of the lessor: *Doe* v. *Bancks.* (1) This decision was followed in a case where the words were that the licence to work mines should be "utterly void and of no effect to all intents and purposes": *Roberts* v. *Davey* (2); and was applied in the case of a sale of land (*Malins* v. *Freeman* (3)), a deed for the benefit of creditors (*Hyde* v. *Watts* (4)), and a composition deed under s. 192 of the Bankruptcy Act, 1860 (*Hughes* v. *Palmer* (5)). In *Davenport* v. *Reg.* (6) the rule of construction that "void" means "voidable" was again applied to a lease, and it was said that "the same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract": see also *Jay's Furnishing Co.* v. *Brand & Co.* (7) It is impossible to say that "void" means void and at the same time to imply a term that in certain events it is only voidable at the option of the purchasers. There is no room for any such implication.

Sir John Simon, K.C., and *Barrington-Ward* (*Jacques Quartier* with them), for the builders. "The date agreed by this contract"

(1) (1821) 4 B. & Al. 401.
(2) (1833) 4 B. & Ad. 664.
(3) (1838) 4 Bing. N. C. 395.
(4) (1843) 12 M. & W. 254, 268.
(5) (1865) 19 C. B. (N.S.) 393.
(6) (1877) 3 App. Cas. 115, 128.
(7) [1915] 1 K. B. 458, 464, 465, 466.

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in clause 12 means January 30, 1915, and therefore the eighteen months expired on July 30, 1916.

Secondly, the word "void" must be construed in its natural sense as meaning void and not merely voidable: *Rex* v. *Inhabitants of Stoke Damerel* (1); *Pearse* v. *Morrice*. (2) Clause 12 is introduced into the contract for the benefit of both parties, and upon the happening of any one of the events there specified the contract is to be void. Some of those events may happen without any wrongful default on the part of the builders. The ship remains where it is and the purchasers receive back the money they have paid with interest. At the same time a party cannot take advantage of his own wrong in bringing about the event which avoids the contract: *Malins* v. *Freeman* (3); *Davenport* v. *Reg.* (4) The contract therefore is void, but there is an implied proviso that the party in default who is relying on his own wrong cannot set up the avoidance of the contract. It is not true to say that, though the contract is stated to be "void" the other party can always insist upon it being performed. In the present case the umpire has found that the builders were prevented by unpreventable causes beyond their control from completing the vessel. They were therefore not guilty of any default. In the landlord and tenant cases the happening of the event which caused the lease to be "void" was in the control and power of the tenant alone, and if the tenant could by his own wrongful act claim to set up the avoidance of the lease the landlord would be deprived of valuable rights under the lease by the wrongful act of the tenant. The Courts, therefore, to avoid that result have refused to allow the tenant to take advantage of his own wrong in avoiding the lease, and it is in that sense only that the Courts have said that the lease is voidable at the option of the lessor. [*Lazarus* v. *Cairn Line* (5) was also referred to.]

Leck, *K.C.*, in reply.

VISCOUNT READING C.J. The first question is whether "the date agreed by this contract" is January 30, 1915, or whether there must be added to the period for the completion of the steamer the

(1) (1827) 7 B. & C. 563.
(2) (1834) 2 Ad. & E. 84, 94.
(3) 4 Bing. N. C. 399, per Coltman J.
(4) 3 App. Cas. 128, 129.
(5) (1912) 17 Com. Cas. 107.

time during which work is delayed by an unpreventable cause beyond the control of the builders. The umpire and Bailhache J. decided this point in favour of the builders' contention, and I have come to the same conclusion. In my opinion "the date agreed by this contract" is the calendar date, namely, January 30, 1915, and to that must be added the eighteen months provided in the case of France becoming engaged in a European war. Therefore on July 30, 1916, clause 12 became operative.

The next question is whether the contract is void. The builders were not in default in any way; they were simply unable to deliver the steamer by an unpreventable cause beyond their control owing to the war. The purchasers, however, are not content with getting the money they have paid to the builders back with interest, because the value of ships has risen considerably. Their contention is that the contract became voidable only at their option. The stipulation in the contract is that at the agreed date as extended to July 30, 1916, the contract shall become void. In support of the purchasers' contention reliance is placed on cases between landlord and tenant, in which, no doubt, it is at times said that "void" means voidable. Without going through the authorities I may state shortly that I have come to the conclusion that in every contract where the word is used "void," according to its natural and ordinary meaning, means void to all intents and purposes. Nevertheless there may be a case where the party who is alleging that the contract is void may have to rely upon his own default or wrong in order to bring into operation the clause making the contract void. Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. In *Malins* v. *Freeman* (1) Coltman J. said: "It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favourable to such a purpose." That appears to me to be the true underlying principle of the cases in which the word "void" has been construed as if it meant voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not

(1) 4 Bing. N. C. 399.

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himself in default. In my opinion Bailhache J. was right in holding that "void" means void and not voidable at the option of the purchasers; and in giving effect to that construction in this case we are not in any way infringing the principle that a party shall not take advantage of his own default or wrong. The appeal fails and must be dismissed.

PICKFORD L.J. I agree, and have nothing to add.

SCRUTTON L.J. On the first point I agree. On the second point I think that clause 12 and all other clauses are to be read subject to an overriding condition or proviso that the party shall not take advantage of his own wrong, and therefore is estopped from alleging invalidity of which his own breach of contract is the cause. In this case the shipbuilders were unable to deliver the steamer in the contract time and were not in default. They can therefore allege that the contract is void.

Appeal dismissed.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Calder Woods & Pethick.*

W. F. B.

In re CASTLE (TRADING AS SCHLOSS BROTHERS).

1917
June 18.

Bankruptcy—Contracts made with Bankrupt—Order rescinding some only of Contracts—Conditions necessary to make Order inequitable—Co-ordination between Contracts—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 54, *sub-s.* 5.

By s. 54, sub-s. 5, of the Bankruptcy Act, 1914, "the Court may, on the application of any person who is, as against the trustee . . . . subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable . . . ."

In March, 1916, the applicants entered into a contract with the bankrupts to supply to the bankrupts certain cotton-cloth goods, and in April, 1916, into two further contracts to supply to them a different kind of cotton-cloth goods. At the date of the bankruptcy the applicants had made no delivery to the bankrupts under the contract of March, 1916, but they had made part deliveries to the bankrupts under both contracts of April, 1916, and 95*l.* was due and owing from the bankrupts to the applicants in respect of those deliveries. Upon an application against the trustee in the bankruptcy for an order rescinding the three contracts:—

Held, that there must be some co-ordination between the three contracts in order to make it inequitable that the applicants should not be relieved from carrying out the contract of March, 1916, but that the two other contracts should be rescinded, and that the proper order was that the two contracts of April, 1916, should be rescinded, the applicants to prove for the sum of 95*l.*, but that as regarded the contract of March, 1916, there should be no order.

MOTION on behalf of the applicants, Haslum Brothers, Limited, cotton manufacturers of Burnley and Manchester, against the respondent, the trustee in bankruptcy of the debtors, three brothers named Castle, who carried on business in partnership in London and Manchester under the style of Schloss Brothers, for an order rescinding three contracts, one of which was dated March 31, 1916, and the two others April 19, 1916, for the making and delivery of cotton-cloth by the applicants to the firm of Schloss Brothers.

The contract of March 31, 1916, was for the making and delivery by the applicants of cotton-cloth called "grey domestics," and the two contracts of April 19, 1916, for cotton-cloth called "grey

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CASTLE, *In re.*

printers." The application was made under s. 54, sub-s. 5, of the Bankruptcy Act, 1914. (1)

On June 30, 1916, a receiving order was made against the firm of Schloss Brothers, and on the same day the firm was adjudicated bankrupt. At the date of the bankruptcy no delivery had been made of the goods the subject-matter of the contract of March 31, 1916, but the applicants had made part deliveries to Schloss Brothers under both contracts of April 19, 1916, and 95*l.* was due and owing from Schloss Brothers to the applicants in respect of those deliveries. The three contracts were entered into with the applicants by the Manchester branch of Schloss Brothers, and that branch of the business had, together with benefit of the contracts, been sold by the trustee. The purchasers, and therefore the trustee, did not desire completion of the two contracts of April 19, 1916, and had so intimated to the applicants, but they did desire the applicants to complete the contract of March 31, 1916, the trustee undertaking to pay the contract price in full.

Ralph Sutton, for the applicants. Under the two contracts of April 19, 1916, if the trustee wants further deliveries he must pay for the goods already delivered and tender the price for those still to be delivered on the principle laid down in *Ex parte Chalmers*. (2) As regards the contract of March 31, 1916, where no goods have been delivered other considerations arise. The creditors have had the benefit of the part performance of the two contracts of April 19, 1916, and as the trustee declines to go on with those contracts it is inequitable to say that the applicants must perform the contract of March 31, 1916. The sub-section gives the Court a discretion, and this is one of the cases in which the Court should exercise its discretion by rescinding the three contracts.

(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 54, sub-s. 5: "The Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy."

(2) (1873) L. R. 8 Ch. 289.

E. W. Hansell, for the trustee. The motion is unnecessary as regards the two contracts of April 19, 1916. As regards the contract of March 31, 1916, each contract is a separate one and stands on its own merits. The applicants have shown no ground for the rescission of that contract.

HORRIDGE J. Strictly speaking there are three motions. There must be some co-ordination between the three contracts in order to make it inequitable that the applicants should not be relieved from carrying out the contract of March 31, 1916, but that the two others should be rescinded. The proper order is that the two contracts of April 19, 1916, be rescinded and that the applicants prove in the bankruptcy for the sum of 95*l.*, the amount due and owing in respect of the deliveries made by the applicants under these two contracts. The applicants have not made out a case for the cancellation of the contract of March 31, 1916. The applicants should give the trustee notice to elect whether he will carry out that contract within a reasonable time. As regards this contract there will be no order.

Solicitors for applicants: *Littledale & Lefroy, for Southern, Fullalove & Ritchie, Burnley.*

Solicitors for trustee: *Kekewich, Smith & Kaye.*

J. E. A.

1917

June 25.

In re MACKENZIE.

Bankruptcy—Official Receiver acting as Trustee—Rejection in part of Proof on Ground that Transaction harsh and unconscionable—Exercise by Court in considering Rejection of Powers conferred by Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-s.* 3.

When an official receiver acting as a trustee in bankruptcy has rejected, in part, a proof on the ground that the transaction was harsh and unconscionable within the meaning of the Money-lenders Act, 1900, the Court in considering such rejection will exercise the powers conferred by s. 1, sub-s. 3, of the Act.

APPEAL by a firm of money-lenders, duly registered under the name of H. Bowen, from a decision of the official receiver as trustee rejecting to the extent of 260*l.* a proof of the appellants made in the bankruptcy.

The appellants proved for 660*l.*, the balance they alleged to be due to them upon a judgment obtained by them against the debtor in respect of an action brought against her upon three promissory notes, the consideration being money lent by them to her at her request. The official receiver rejected the proof except to the extent of 400*l.* The ground upon which he reduced the proof was that the transaction was harsh and unconscionable within the meaning of the Money-lenders Act, 1900. (1)

E. W. Hansell, for the appellants. Apart from the merits, the question arises whether under s. 1, sub-s. 3, of the Money-lenders Act, 1900, the official receiver, as trustee in bankruptcy, has the power in dealing with the proof to reopen the transaction. On the hearing of a petition the registrar has ample powers under the

(1) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1, sub-s. 1: "Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act . . . . and the transaction is harsh and unconscionable . . . . the Court may reopen the transaction . . . ."

Sub-s. 3: "On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money."

section, but the word " Court " does not include the trustee. [*In re a Debtor* (1) was referred to.]

Comyns Carr, for the respondent the official receiver and trustee.

1917

MACKENZIE, *In re.*

HORRIDGE J. held that he must hear the appeal. Upon the merits he allowed the appeal and admitted the proof for dividend at 505*l.*

Appeal allowed.

Solicitor for appellants: *A. H. Freeman.*
Solicitors for respondent: *Fladgate & Co.*

J. E. A.

In re MARQUIS OF HUNTLY. *Ex parte* GOLDSTEIN.

1917

June 25.

Bankruptcy—Matter properly triable in County Court—Application by Official Receiver to County Court Judge to make Order requesting High Court to act in aid of County Court—Jurisdiction of County Court Judge to make Order—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 122.

Sect. 122 of the Bankruptcy Act, 1914, which enacts that every British Court having jurisdiction in bankruptcy shall act in aid of each other, was passed to enable one Court to assist another in dealing with matters which were within the jurisdiction of the Court asked to act, but not to enable a matter proper to be dealt with by the requesting Court to be sent for trial by another Court.

The official receiver and trustee under a composition approved by the Court having rejected the appellant's proof of a debt due in respect of moneys advanced to the debtor upon four bills of exchange the appellant gave notice of appeal to the county court against the rejection of the proof. The official receiver gave notice that he intended to apply to the county court judge for an order asking the High Court of Justice in Bankruptcy to act in aid of and be auxiliary to the county court so as to enable the appeal to be heard before the judge in bankruptcy in London instead of by the county court. In support of the application he reported to the county court (inter alia) that the circumstances leading up to

(1) [1903] 1 K. B. 705.

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the debt were of an intricate and peculiar nature. The county court judge made the order. On appeal to the Divisional Court:—

Held, that, as it was quite within the competence of the county court judge to determine the appeal, he had no jurisdiction under the section to make the order, that, even if he had the power, there was no ground for making it.

APPEAL from an order of the judge of the Peterborough County Court of Northamptonshire sitting in bankruptcy, dated April 12, 1917, ordering, in pursuance of s. 122 of the Bankruptcy Act, 1914 (1), that the High Court of Justice in Bankruptcy be asked to act in aid and be auxiliary to that Court so that the appeal of Isaac Goldstein from the official receiver's rejection of his proof for 3114*l.* 5*s.* might be heard before the judge sitting in bankruptcy in London.

On December 23, 1914, the appellant, Isaac Goldstein, lodged a proof for 3114*l.* 5*s.* for moneys advanced by him to one Samuel Goldstein upon four bills of exchange for 1000*l.* each alleged to have been drawn by one Josephson upon and accepted by the debtor, the Marquis of Huntly. The appellant alleged that Josephson indorsed the bills to one Samuel Goldstein for value, and that Samuel Goldstein indorsed them to the appellant for value. By notice dated February 17, 1917, the respondent, the official receiver and trustee, under a composition approved by the Court, rejected the appellant's proof, and by notice dated March 9, 1917, the appellant gave notice of appeal to the county court against the rejection.

(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 100, sub-s. 2: "Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court . . . ."

Sect. 122: "The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

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HUNTLY (MARQUIS), *In re.* GOLDSTEIN, *Ex parte.*

The hearing of the appeal in the county court was fixed for May 3, 1917, but on March 31, 1917, the official receiver and trustee gave notice that he intended to apply to the county court judge on April 12, 1917, for an order asking the High Court of Justice in Bankruptcy to act in aid of and be auxiliary to the county court, with all necessary directions to enable the appeal of Isaac Goldstein to be heard before the judge in bankruptcy in London instead of by the county court. In support of his application he reported to the county court that the circumstances leading up to the claim were of an intricate and peculiar nature, there having been considerable litigation as to the bills of exchange in question, that both Isaac and Samuel Goldstein resided in London, and that the solicitor acting in the matter for them practised in London; that the solicitor acting for the official receiver likewise resided in London, as also did the counsel by whom he proposed to be represented at the hearing of the appeal; and that, having regard to these facts and the possibility that all the persons concerned in the appeal might attend at Peterborough at considerable expense on May 3, 1917, and the case might not be reached, he requested the Court to make the order asked for by his notice of motion.

On April 12, 1917, the county court judge made the order as requested by the official receiver and trustee.

Isaac Goldstein appealed.

E. H. Coumbe, for the appellant. The order of the county court judge was wrong. Sect. 122 of the Bankruptcy Act, 1914, means that if it is necessary or convenient that one Bankruptcy Court should aid another it will do so—e.g., in issuing a warrant. But it does not mean that one Court can hand over business within its jurisdiction, and which is proper to be dealt with by it, to another Court. That is the effect of the order made by the county court judge. It in effect transfers the proceeding from the county court to the High Court. Sect. 100 of the Bankruptcy Act, 1914, which relates to the transfer of proceedings, does not give a county court power to make that transfer. Even if he had jurisdiction, there is nothing in the appeal to the county court judge which he is not perfectly competent to decide, or which justified him in making the order.

Hon. M. M. Macnaghten, for the respondent. The county court

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judge had jurisdiction under s. 122 of the Bankruptcy Act, 1914, to make the order, and the facts stated in the respondent's report show that he rightly exercised his discretion in making it.

HORRIDGE J. A motion to reverse the decision of the official receiver and trustee rejecting the proof of Isaac Goldstein was set down in the Peterborough County Court. That was entirely within the jurisdiction of that Court, and in the ordinary course ought to have been dealt with by the judge of that Court, but an application was made to the judge of that court to request me to hear the motion instead of himself. That was made under s. 122. Now I believe that section was passed in order to enable one Court to assist another Court in dealing with matters which were within the jurisdiction of the Court asked to act, but I do not believe that it was ever meant that a question which was a matter proper to be dealt with by the requesting Court should be sent for trial by another judge—in this case to me as sitting judge of the Bankruptcy Court. In my view that section did not enable him to do that. By s. 100 of the Bankruptcy Act, 1914, the matter might have been transferred to London if there was ground for the exercise of the power of transfer. The Legislature has invested the county courts to whom bankruptcy jurisdiction is assigned with the same powers as I have.

But, further, even supposing that the county court judge had the power to make the order, there were, in my judgment, no sufficient grounds for exercising it. I must recognize that the county court judge is perfectly capable of dealing with intricate and difficult matters arising in the Court over which he presides. It is not a long distance to Peterborough. The appellant is willing to go there, and I expect that Samuel Goldstein will be able to do so. The official receiver is at Cambridge. The fact that he chooses not to wish the matter to be heard at Peterborough is no reason why I should hear it. Counsel very often have to go down to county courts, and I do not think that s. 122 was ever intended to enable county court judges to transfer matters from their own Courts to be decided by a judge of the High Court. I think that the appeal must be allowed.

LOW J. The first question is whether under s. 122 there is jurisdiction to make the order which we are asked to review. That

section provides for Bankruptcy Courts assisting each other in the work of bankruptcy, but was it intended by the wording of that section that a learned county court judge who is properly seised of a particular piece of business should be enabled to shift work included in that particular business on to some other Court? It seems to me that it would be an abuse of words to say that because Bankruptcy Courts are to act in aid of and be auxiliary to each other they are to be required to do each other's ordinary work. I am satisfied that there is no power under this section to make the order which the learned judge has made in this case.

But then arises the further point. Supposing there was power, is any ground whatever shown for exercising it? It is said that there is some intricacy in this case arising from the suggestion that a person has taken a bill of exchange with notice of some fraud. The question whether a person is or is not a bona fide holder of a bill of exchange without notice is quite within the competence of any county court exercising bankruptcy jurisdiction to determine, and I can hardly think that the mere existence of facts such as those alleged in this case can be any ground for making the order. The appellant does not show any objection to proceeding to Peterborough. It is said that the official receiver wants the hearing to take place in London because he has chosen to instruct a London solicitor. That is a reason which requires no refuting, for if the official receiver for a given district is to be allowed to get his business transferred to London because he has instructed a solicitor foreign to his district there would be applications without number. The only other reason is that counsel has to be instructed in the case and has to be brought from London. That is not a reason; it is an excuse. It is then said that the bankruptcy judge in London should deal with this matter because the county court judge has so arranged his work that it is possible he might not be able to deal with it. It is the duty of the county court judge to so arrange his work that he can hear and determine the matter. I entirely agree that this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Raymond Burrow.*

Solicitors for respondent: *Fowler & Co.*

J. E. A.

C. A.
1917
July 6.

[IN THE COURT OF APPEAL.]

In re SHAW.

Bankruptcy—Adjudication—Discharge—Discretion of Court—Agreement by Trustee in Bankruptcy with Debtor to dissuade Creditors from objecting to Application for Discharge—Purchase of Debts on Debtor's Behalf at unequal Rates by Friend of Debtor—Privity of Debtor—Creditors unaware of Facts—Suspension of Discharge.

A debtor was adjudicated bankrupt on May 15, 1914, his debts amounting to over 3500*l.*, and there being practically no assets. Since his adjudication he had entered into the service of a company, and was in receipt of a salary of 1200*l.* a year. On April 20, 1916, he entered into an agreement with his trustee in bankruptcy to pay 360*l.* a year by monthly instalments out of his salary until his debts should be paid in full. The trustee agreed that when these payments should have amounted to a sufficient sum to pay the creditors 5*s.* in the pound no objection would be raised by him, and he would use his best endeavours to prevent any objections by any creditors to any application for an order of discharge or annulment; 300*l.* had been paid under this agreement. A brother-in-law of the bankrupt, with his consent and privity, had on his behalf bought up the claims to the extent of 1000*l.* of certain creditors, who were unaware of the facts, at rates varying from 10*s.* to 2*s.* 6*d.* in the pound, and had withdrawn as against the estate all claims in respect of the assigned debts. The official receiver reported that the bankrupt's assets were insufficient to pay 10*s.* in the pound, that he had omitted to keep proper books of account, and that he had continued to trade after knowing himself to be insolvent. Under these circumstances the registrar suspended the bankrupt's discharge for two years. On appeal by the bankrupt:—

Held, that the agreement by the trustee binding himself, at the instance of the bankrupt, to prevent any objection by the creditors to an order of discharge was most improper. The purchase of the debts from individual creditors at different prices, without the fullest possible disclosure to them of every material fact, was a most dangerous proceeding. There was ample material to justify the registrar in suspending the order of discharge.

Appeal from an order of Mr. Registrar Mellor suspending the bankrupt's discharge for two years.

The debtor, H. W. Shaw, was adjudicated bankrupt on May 15, 1914, his debts amounting to over 3500*l.* and there being practically no assets.

It appeared from the official receiver's report that since his adjudication the bankrupt had entered into the service of the Staines Projectile Company, Limited, from whom he was in receipt of a salary of 1200*l.* a year. On April 20, 1916, he entered into an agreement with Mr. Fincham, the trustee in his bankruptcy, whereby he undertook to pay to the trustee 30*l.* a month for the benefit of his creditors until 20*s.* in the pound should have been paid to such of them as should prove their claims, and so long as these monthly payments should be duly paid no application should be made to the Court in respect of any salary earned or any property owned by the debtor acquired or to be acquired out of his earnings. As security for the payment of the instalments the bankrupt deposited with the trustee a certificate for 833 fully-paid shares of 1*l.* each in the Staines Projectile Company, which he had acquired since his adjudication, it being agreed that if at any time the bankrupt should desire to release the shares from the charge he might do so upon paying to the trustee the sum of 1*l.* per share. Clause 8 of the agreement provided that if and when the monthly instalments should amount to a sum sufficient to pay the creditors who should have proved their claims the sum of 5*s.* in the pound no objection would be raised by the trustee, and the trustee would use his best endeavours to prevent any objections by any creditors to any application by the debtor for his discharge under or for the annulment of his bankruptcy. The sum of 300*l.* had been received by the trustee under this agreement. It further appeared from the official receiver's report that a Mr. Howlett, the bankrupt's brother-in-law, with the privity of the bankrupt, had purchased the debts of twenty-five of the creditors, amounting in the aggregate to about 1000*l.*, at rates varying from 2*s.* 6*d.* to 10*s.* in the pound, and that Mr. Howlett had absolutely withdrawn as against the estate all claims which he might have in respect of the assigned debts. It was stated by some of the assigning creditors that they were unaware of the bankrupt's salary and of the arrangement between him and the trustee when they agreed to assign their debts.

The official receiver reported that the bankrupt's assets were insufficient to pay 10*s.* in the pound, that he had omitted to keep proper books of account, and had continued to trade after knowing himself to be insolvent.

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The registrar, by an order dated May 8, 1917, directed that the bankrupt's discharge be suspended for two years, and that he be discharged as from May 8, 1919.

The registrar in the course of his judgment said that clause 8 of the agreement was a most improper clause to appear in an agreement entered into between the trustee and a debtor. It had frequently been laid down in the Courts that a trustee is trustee for all the creditors, and it is not within his rights to bargain away the right or the duty of any creditor to attend on an application by the debtor to get rid of his bankruptcy by annulment or discharge. It was most improper that a trustee should under any circumstances agree to do his best to dissuade the creditors from attending and opposing the debtor's application for discharge. The learned registrar did not suggest that there was anything fraudulent in the debtor's conduct, but it was improper for the trustee to seek to tie the hands of the creditors. With reference to the purchase of debts by the bankrupt's brother-in-law, the bankrupt knew of this and it was done on his behalf. *In re E. A. B.* (1) and other decisions showed that in the case of a scheme of arrangement the mere fact that the debtor himself was a party to purchasing debts at different prices, as in the present case, would in itself have been fatal to his obtaining the sanction of the Court to the scheme, and it could not be too often repeated that such a proceeding was most dangerous. It was an entirely different thing from approaching the whole of the creditors in a body. It was not suggested that either the bankrupt or his brother-in-law was guilty of anything improper in the sense of there being anything fraudulent in what they did, but such a dealing with the creditors required the fullest possible disclosure to the creditors of every material fact which might influence their decision. The ordinary bankruptcy offences proved against the bankrupt did not strike the learned registrar as being serious, but under the circumstances he suspended the discharge for the minimum period of two years.

The bankrupt appealed from the order of the registrar on the ground (inter alia) that he had not properly exercised his discretion, or, alternatively, that he had proceeded on a wrong basis in suspending the bankrupt's discharge in that he had taken into account

(1) [1902] 1 K. B. 457.

and wholly or substantially based his decision upon the provisions of the agreement of April 20, 1916.

Patrick Hastings, for the appellant. There is no suggestion of fraud on the part of the debtor or anybody concerned in the transactions reported on by the official receiver, and under all the circumstances the order of discharge ought not to have been suspended.

Sir Gordon Hewart, *S.-G.*, and *E. W. Hansell*, for the official receiver. There was ample reason for the course taken by the registrar.

Kingham, for the trustee.

SWINFEN EADY L.J. (after stating the facts). Under these circumstances it is not disputed that it was open to the registrar in his discretion to suspend the discharge for a period of two years. It is said, however, that the registrar has exercised his discretion improperly and on some wrong principle because he has taken matters into consideration which he ought not to have had regard to.

In my opinion the agreement entered into by the trustee was most improper, and the language used by the registrar was not in the least too severe with regard to such an agreement. It is to be observed that the effect of it is this: The trustee, being a trustee in bankruptcy for all the creditors and having been chosen to protect the interests of the creditors, binds himself beforehand, at the instance of the bankrupt, to "use his best endeavours to prevent any objections by any creditors" on the bankrupt's application for discharge or annulment of his bankruptcy. Now it was pointed out with perfect propriety by the registrar that it was not within the right of the trustee to bargain away the right or the duty (for it may even be said to be the duty) of a creditor in certain circumstances to attend on an application by the debtor to get rid of his bankruptcy, whether it be by annulment, or whether it be by discharge. For the trustee, without knowing what the facts might be on the application for annulment or for discharge, to bind himself beforehand to use his best endeavours to prevent the creditors from opposing the annulment or the discharge is a highly improper thing and something which, in my judgment, no trustee ought ever

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SHAW, *In re.*

Swinfen Eady L.J.

to do. The argument addressed to us on behalf of the trustee does not improve the position. It was urged on behalf of the trustee that he was obliged to assent to that stipulation because the bankrupt would not enter into the agreement at all without it. Now it will be observed that during the bankruptcy the bankrupt had acquired 833 shares in this company and was in receipt of a salary of 1200*l.*, as to which an application might be made under s. 51 of the Bankruptcy Act. Notwithstanding that, the trustee, in my judgment, most improperly executed this agreement with the bankrupt. This much may be said in favour of the trustee, that there is no suggestion that it was corrupt on his part; he was not bribed to do it; it is not suggested that he got any personal benefit for himself out of it. It is said that at the most it was an error of judgment on his part to do it. But, accepting that view, it was a very grave error of judgment, and the agreement was one that under no circumstances ought a trustee in bankruptcy ever to enter into.

Then, again, the circumstances under which these debts were bought up were extremely unsatisfactory. With that part of the case the trustee in bankruptcy is not concerned. He was not a party to the debts being acquired, but the bankrupt was; it was with his privity that these arrangements were made whereby the creditors assigned their debts for various considerations at the different amounts I have mentioned, and then, of course, the official receiver has the complaint made to him that some of them were not aware when they did so of the salary of 1200*l.* a year, or of the agreement by the bankrupt to pay the 30*l.* a month to the trustee until the debts were paid in full.

In my opinion the circumstances of the case are such that there was ample material upon which the registrar in the exercise of his discretion should suspend the discharge of the bankrupt, and there is no ground for the point raised upon the appeal that he took into consideration matters which ought not to have been taken into consideration. In my judgment there is no ground upon which this appeal can be allowed, and it should be dismissed.

BANKES L.J. I agree. As I understand the complaint, it is that upon the facts before him the learned registrar ought not to

have drawn any inference adverse to the bankrupt. Upon the argument before us it appears to me that there was really no attempt to maintain that position upon the facts as they appeared before the registrar. Take first of all the clause in the agreement. It is not disputed that that is a clause which may be called improper and which under any ordinary circumstances a trustee ought not to enter into and a bankrupt ought not to enter into. From the trustee's point of view it is said that he was acting on advice; he was put in a difficult position because the bankrupt's solicitor said that the bankrupt would not sign the agreement unless the clause was agreed to, and he was acting upon advice. Well, all I can say about that is that it seems to me that the trustee misconceived his position and his duty altogether in agreeing to any such clause, and if he was acting on advice it was bad advice, and he would be well advised to change his advisers.

So far as the bankrupt is concerned, his counsel really does not defend the clause in the agreement, but he says that under the circumstances the bankrupt ought not to be blamed for either allowing his solicitor to insist upon it, or for his solicitor inserting it in the agreement. Again, it is said that he was acting upon advice. Upon that, all that I can say is that there is no evidence of it. If I assume that he was acting upon advice and that his solicitor drafted the agreement, again it was bad advice. But from the point of view of the bankrupt what seems to me much more serious is his conduct with regard to the buying up of the debts of these creditors, because the position, according to him, was that he had entered into an agreement with the trustee under which he was obliged himself to pay these creditors in full, and, having done that, he allows his brother-in-law to go round and to purchase these debts at figures which upon the face of them would indicate that the creditors were wholly ignorant of the position in which the bankrupt had placed himself by this agreement. On the other hand it is said that that is a purely wrong inference because a meeting of creditors was called and they were all fairly informed of the facts, and every one of these creditors entered into these bargains with their eyes open, knowing what the position was, preferring to enter into this arrangement. If it were so it would be quite easy to prove it and give evidence of it, and of course, if evidence were given of it, it would

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explain away that fact, which otherwise seems to me to justify, and abundantly justify, the conclusion at which the learned registrar arrived.

Upon these grounds I agree that this appeal fails.

WARRINGTON L.J. I am of the same opinion. I think the matter was entirely in the discretion of the registrar. The official receiver's report disclosed facts which under the Bankruptcy Act, 1914, were sufficient to justify the suspension of the debtor's discharge. The ground put forward on behalf of the debtor in support of the appeal is that the registrar in dealing with the question took into account certain circumstances which had no bearing on the question which he had to determine and that he was thereby misled in exercising his discretion in the way he did.

The two points which he did take into account were, first, the agreement between the trustee and the bankrupt, and, secondly, the purchase of the debts from individual creditors at different amounts.

With regard to the first of these two circumstances, the clause about which we have heard so much was obviously inserted in the agreement for the benefit of the debtor. He must therefore be held responsible for having stipulated for that particular provision. Now let us see what that provision is. I pass over for the moment that part of it which provides that the trustee shall use his best endeavours to persuade the creditors not to object to the discharge. Looking at the position of the trustee himself, he bound himself on the sole condition that the debtor should have paid enough to give 5*s.* in the pound to the creditors not to raise any objection to an application for discharge. Whatever circumstances may have come to his knowledge, whatever he may know at the time that the application is made, he is not to disclose those facts or that knowledge to the Court—facts and knowledge which it might be extremely material for the Court to know in determining whether the discharge ought to be granted or not. How comes it that the trustee, who is not there in the interest of the debtor, but in the interest of the general body of creditors to look after the due administration of the estate, so binds himself that, whatever the circumstances may be, he is not to raise objection to the discharge of the debtor or

the annulment of the bankruptcy? I need say no more about that.

With regard to the purchase of the debts, it was admitted by the debtor, or his counsel, before the registrar that he had been a party to the purchase of those debts. It is to be borne in mind that these creditors were negotiating as individuals, and it is obvious that the negotiations must have been so conducted (for it is impossible to suppose that one creditor would have been willing to accept 2*s.* 6*d.* in the pound while another creditor was to get 10*s.* in the pound) that the creditors cannot have been put upon an equal footing in the negotiations resulting in the purchase of these debts. That is enough, to my mind, to show that that also was a circumstance which the registrar was justified in taking into account in exercising his discretion.

For these reasons I am of opinion that the discretion was exercised properly and that the appeal must be dismissed.

Solicitors for appellant: *Kenneth Brown, Baker & Baker.*
Solicitor for trustee: *Henry Stewart Moore.*
Solicitor for official receiver: *The Solicitor to the Board of Trade.*

G. A. S.

C. A.

1917

July 10, 11.

[IN THE COURT OF APPEAL.]

MAYDEW *v.* CHATTERLEY-WHITFIELD COLLIERIES, LIMITED.

Employer and Workman—Compensation—Injury by Accident—Arising out of Employment—Prohibited Act—Regulations made under s. 86 *of the Coal Mines Act,* 1911 (1 *& 2 Geo.* 5, *c.* 50)—*Sphere of Employment —Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed as a horse-driver in the employers' colliery was seriously and permanently injured by being struck by a projecting bar of the roof of one of the mine levels of the colliery whilst riding on a truck contrary to the rules of the colliery. His duty was to walk by the side of the horse and to scotch the wheels of the truck with a stick provided for that purpose when the truck was descending an incline and so check its speed. The practice of riding on trucks was prohibited by the rules of the colliery, and also by one of the mine regulations made by the Secretary of State under s. 86 of the Coal Mines Act, 1911, which provided: "25A. No person below ground shall ride upon any animal, nor, except by permission of the manager or under-manager, upon any tram, tub or other contrivance drawn by a horse or other animal." No permission to ride on the truck had been given to the workman by the manager or under-manager. Upon a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the accident did not arise out of and in the course of the employment:—

Held, that the workman in riding on the truck was acting outside the sphere of his employment, and that, therefore, the accident did not arise out of his employment.

Barnes v. *Nunnery Colliery Co.* [1912] A. C. 44 and *Herbert* v. *Samuel Fox & Co.* [1916] 1 A. C. 405 applied.

APPEAL from an award of the judge of the Burslem County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of Swinfen Eady L.J.: "The injured workman was a lad employed in the respondents' colliery. He had worked in the colliery for several years, but there was an interval during some part of the year 1916 when he left, but returned during the same year. For some two or three months of the time he had worked there as a driver. At another part of the time he had worked as a taker-off. At the time

of the accident in question he was working as a driver. The accident happened on December 8, 1916. He was then taking some loaded trucks along a mine level, and, contrary to a rule of the colliery, he got on to the load to ride instead of walking on the ground. He mounted the loaded truck, and, owing to a jerk, his lamp went out, and he was left in the dark. He had no reins—the horse was running free. The trucks were on a downward incline, so that he could not call to the horse to stop, because if he had done so the trucks would have run on to the horse. He had been provided with a stick to scotch the wheels, and, if he had been walking in the ordinary way, he would have been able to do that. It was his duty, when necessary, to scotch the wheels with the stick which he carried for that purpose by putting it through the spokes of a wheel, and so putting a sort of brake on to the trucks. He was unable to do this on the occasion in question, because he was riding on the trucks himself; and for the reason which I have mentioned he could not call to the horse to stop. He bent down so as to clear anything which was projecting from the roof of the level, but he was caught by one of the beams of the roof, and was thrown off the load on to the track, where he was found by the road foreman. He sustained injuries to his spine which were of a serious character, and was in the hospital from the date of the accident until some time in the February following, and it is said that there will be a serious and permanent partial disablement as a result of the accident. One of the regulations of the colliery made by the Secretary of State under s. 86 of the Coal Mines Act, 1911, provides, by regulation 25A, that 'No person below ground shall ride upon any animal, nor, except by permission of the manager or under-manager, upon any tram, tub or other contrivance drawn by a horse or other animal.' It was not suggested here that the workman had the permission of the manager or of the under-manager to ride upon the truck. The manager was called, and the learned county court judge said that he accepted every word of his evidence as quite satisfactory. The learned county court judge found that the practice of riding on the trucks was in fact forbidden and was a most dangerous practice, and he said that the evidence of the manager, which evidence he accepted, was that the manager did everything in his power to prevent riding on trucks; that the manager had suspected boys of riding although he had not caught

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them at it; that the manager said he had no doubt the practice of riding was in vogue, and that he gave the most peremptory orders, which were brought to the notice of every boy in the mine, that it was absolutely forbidden. At the time of which the manager was speaking the workman was a boy engaged in the mine. Then the learned county court judge further considered the question as to whether this boy knew of the regulation prohibiting riding on the trucks. The regulation is a regulation framed in accordance with the statutory provision of the Coal Mines Act, 1911. By s. 88 of the Act an abstract of the Act and a copy of all the regulations of the mine have first to be posted up in a conspicuous place at or near the mine, and then, secondly, the manager has to supply gratis to each person employed in or about the mine at the time of the commencement of his employment, and on each occasion when a new abstract is issued or new regulations made, a book containing so much of the abstract and so much of the regulations as the Secretary of State may prescribe as being the parts of the abstract and regulations for the time being in force affecting persons of the class to which the person belongs. So that there is a statutory obligation on the mine managers to supply this abstract to each person employed. The learned county court judge, with regard to that, says that the boy said that no prohibition had ever been given to him, but that, on the other hand, there was evidence, and strong evidence, that a copy of the rules was handed to him when he entered the mine, and when he re-entered the mine, that is, when he entered it the second time."

The county court judge held that the onus of proof was on the applicant to show that he did not know that he was breaking the rule, and that he had not discharged it. He accordingly held, following the decision in *Barnes* v. *Nunnery Colliery Co.* (1), that the injury was not caused by an accident arising out of the employment.

The applicant appealed.

Rigby Swift, K.C., and *W. E. Allen*, for the appellant. The county court judge was wrong in holding himself bound by *Barnes* v. *Nunnery Colliery Co.* (1) to make his award in favour of the respondents. The facts here are entirely different. In that case the boys

(1) [1912] A. C. 44.

had nothing whatever to do with the tubs. Here it was the duty of the boys to drive the trucks. That case does not, therefore, cover the present, and did not compel the county court judge to hold that the appellant by riding on the truck had added a risk which took him out of the sphere of his employment. The county court judge has not found that the appellant knew of the rule prohibiting the riding on trucks. At the time of the accident the appellant was doing what he was employed to do, but was doing it in a wrong way. That was not doing something outside the sphere of his employment: *Blair & Co.* v. *Chilton.* (1)

[BANKES L.J. If there is a rule, as here, it limits the scope of his employment.]

The rule, no doubt, is a factor which must be taken into account in considering the sphere of the employment, but it does not fix it. The county court judge has stated that he was unable to make up his mind whether or not the appellant knew of the existence of the rule. No case has decided that where a man is employed to work a machine in a particular manner, by working it improperly he thereby takes himself out of the scope of his employment. Here the appellant should have been walking beside the truck instead of riding upon it; but the fact that he rode upon it does not take the case out of the sphere of his original employment. At the time of the accident he was doing his work of taking charge of the horse and trucks. It was no doubt part of his duty to scotch the wheels of the trucks in order to check their pace, but it was not suggested at the trial that it was his duty to do so on the gradient on which the accident happened. Even assuming he had been walking beside the trucks at the time, he could not have scotched the wheels, as his lamp went out and he was in the dark. Mere change of working position does not necessarily take a workman out of the sphere of his employment: *Harding* v. *Brynddu Colliery Co.* (2) In *Herbert* v. *Samuel Fox & Co.* (3), which is the nearest case to the present, the workman was not doing the work at all. He had left it. It was his duty to be in a position to warn the engine-driver, and he could not do this if he were sitting, as he was, on a buffer at the end of the train.

(1) [1915] W. N. 203; 8 B. W. C. C. 324.

(2) [1911] 2 K. B. 747.

(3) [1916] 1 A. C. 405.

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[WARRINGTON L.J. It was the same here. The boy could not scotch the wheels if he was riding on the truck.

BANKES L.J. There was no suggestion in *Herbert* v. *Samuel Fox & Co.* (1) that the workman could not have warned the engine-driver if he had chosen.]

The House of Lords have nowhere laid it down that the mere being out of the place in which he ought to be puts a man out of the sphere of his employment. The question here is, Did the appellant, by doing what he did, abandon the work for which he was employed? There is here no evidence that the contract was that the appellant should drive whilst walking on the ground. The original contract with him was that he should come in and drive.

[BANKES L.J. Are not the rules part of the contract?]

No. He has no doubt to obey the rules. The contract was that he should drive, and when he entered upon the work he then received instructions as to how he was to drive.

[WARRINGTON L.J. It is difficult to suppose that the boy did not know that it was wrong to ride on the truck.]

It is submitted that it is immaterial to consider whether he did or did not know. If it was a risk incurred by going outside the sphere of the employment, the onus was on the employers to prove that the prohibition was brought to his knowledge and that it was not winked at: *Richardson* v. *Denton Colliery Co.* (2) This onus they have failed to discharge. At least the case ought to be sent back to the county court judge to ascertain what the real terms of the contract of employment were.

W. Shakespeare and *Graham Milward*, for the respondents. The county court judge has found that the riding on trucks was prohibited, and that it was a practice which the employers in no way sanctioned. If that finding can be upheld, there is an end of the appeal. It was open to the county court judge to find that the accident did not arise out of and in the course of the employment. Riding on trucks was prohibited by a rule which had statutory effect. The county court judge could find on the facts that the employers never employed the boy to ride on the trucks. The existence of the rule made no difference except as showing that the boy was not employed to ride on the trucks. If he was not employed

(1) [1916] 1 A. C. 405. (2) (1913) 6 B. W. C. C. 629.

to ride on the trucks, then, after the decision in *Barnes* v. *Nunnery Colliery Co.* (1), the accident did not arise out of and in the course of the employment. It is immaterial whether or not the rule was brought to the knowledge of the boy. If the evidence proves that the boys were not employed to ride on the trucks, *Barnes* v. *Nunnery Colliery Co.* (1) shows that if a workman employed to walk chooses to ride he thereby departs from the sphere of his employment. The existence of the rule was relevant evidence on the question whether what happened was due to the circumstances of the employment: *Lancashire and Yorkshire Ry. Co.* v. *Highley.* (2) Whether the rule be statutory or not, it merely shows that the employers had given an express intimation of the nature of the employment. If a risk is not in fact imposed by the employment, a workman's mistaken belief that it is imposed will not make it a risk of the employment: *Wardle* v. *H. G. Enthoven & Sons.* (3) In *Plumb* v. *Cobden Flour Mills Co.* (4) it was held that if a workman does work in a way in which it is not contemplated by his employers he should do it he takes himself out of the sphere of his employment. If a workman is not employed to do a particular act, the mere fact that he is subsequently prohibited from doing it is immaterial. If a workman says that a particular act was an act he was employed to do, he must prove it. He may do so in one of two ways: he may either say (1.) that he was employed to do it, or (2.) that he was given a discretion to do it. The fact that a practice of riding on trucks existed in the mine is not sufficient. The workman must prove that the employers acquiesced in it.

Rigby Swift, K.C., in reply. The regulations made under the Coal Mines Act, 1911, cannot define the limits of the employment. The sphere of the employment is defined expressly or impliedly by the contract of employment. If the regulations are broken the only remedy is a penalty. Regulation 25A is not absolute. It recognizes that there may be cases in which the trucks may be ridden upon.

SWINFEN EADY L.J. This is an appeal by the workman, Wilfred Maydew, from the judgment of the judge of the Burslem County Court by which he held that the applicant had failed to prove that

(1) [1912] A. C. 44.
(2) [1917] A. C. 360.
(3) [1917] W. C. & Ins. Rep. 18.
(4) [1914] A. C. 62.

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the accident from which he suffered arose out of his employment, and made an award in favour of the respondents, the employers. The applicant appeals and asks that this Court should determine that the award should be in his favour, or, in the alternative, that the matter should be remitted for a new trial. [His Lordship then stated the facts as above set out, and continued:] Under those circumstances, what is the test to apply in order to see whether the injured workman is entitled to compensation? I can only apply the test which Lord Dunedin applied in the case of *Plumb* v. *Cobden Flour Mills Co.* (1), which he described as being the first and most useful test. That test is: "Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?" Now the sphere of this boy's employment was to take the trucks from one place to another with a horse, but to do so on foot. That was his employment. He was expressly forbidden to mount the trucks. He could not fulfil his duties if he did so. He was there to have control over the trucks containing the coal, and as soon as he mounted the trucks he lost all control of them, and he was unable to put any brake or scotch on the wheels—he could not regulate their pace. There were no reins attached to the horse, and so, when seated upon the truck, all he could do was to speak to the horse, and by speaking to the horse no doubt the horse would have stopped, but when on a decline he was not able to check the progress of the trucks and they would overrun the horse. In my opinion there was evidence, in that state of things, from which the learned county court judge could come to the conclusion at which he arrived—that the boy had failed to establish that the accident arose out of and in the course of the employment.

In *Barnes* v. *Nunnery Colliery Co.* (2), where the boy was riding on an empty tub, Lord Atkinson said (3): "The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment. That is the crucial test."

(1) [1914] A. C. 66. (2) [1912] A. C. 44.
(3) [1912] A. C. 50.

If that test be applied here, it was certainly a new and added peril for the boy to mount the truck, and he risked, therefore, his head or body coming into contact with the roof or timbering as he passed along.

Again, take the analogous case of *Herbert* v. *Samuel Fox & Co.* (1) Lord Atkinson there said that the rule which was in question had "another and an entirely different function, namely, this, to fix the limits of the workman's sphere of employment." That is what is contended in the present case—that this rule prohibiting employees from riding on trucks limits the sphere of their employment and puts it outside the sphere of their employment. They are not employed to mount the trucks at all. Then Lord Atkinson goes on to say (1): "If an employer employs a workman to do a particular kind of work in an indicated place, and prohibits him from doing a different kind of work in quite another place, the doing of the prohibited work in the prohibited place is not merely wilful misconduct depriving him of the right of compensation, for the simple reason that he never had any right to compensation at all, since the prohibition placed the latter work outside the sphere of his employment. If there ever was a case in which the act, in the doing of which the accident occurred, was outside the sphere of the workman's employment, it was, I think, this case. He was in a place in which he had been forbidden to be and had no right to be." In that particular case the man was riding on the buffer of a truck when he ought to have been walking in front of the truck; his duty was to walk in front of the truck, and not to ride on the truck. Lord Atkinson says: "He was thereby knowingly exposing himself to risks not reasonably incidental to his employment, risks which neither he nor his employers contemplated he should run, risks which the employer forbade him to run, new perils added by his own rashness." Now that is entirely applicable to the present case. There was a regulation that prohibited the boy from incurring this risk; and not only that, he placed himself in a position where he was unable to perform the duty for which he was engaged—he could not regulate the trucks, he could not scotch them on their descent down an incline. For these reasons I am of opinion that, upon the facts of the case, there was ample evidence upon which the learned county

(1) [1916] 1 A. C. 412.

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court judge could say: "Upon these facts, the boy has failed to establish to my satisfaction that the accident arose out of and in the course of his employment." The learned county court judge expresses himself with some doubt as to whether the boy knew that he was doing wrong; but I gather that what the learned county court judge really meant was that he was considering the mental condition of the boy at the time, because he finds that the practice was forbidden, that it was a dangerous practice, that the rules were posted up, and there was definite evidence that the boy had had the rules given to him on two occasions. He seems to me to have been exercised in his mind as to the mental condition of the boy, but, upon the facts of the case, I am quite satisfied that there was ample material upon which the learned county court judge could say that this accident did not arise out of the boy's employment. It arose out of an act which the boy was not only forbidden to do, but by doing which he could not perform his duties to his employers. For these reasons I am of opinion that this appeal fails and should be dismissed.

BANKES L.J. I agree. In the course of the discussion in this Court it has appeared quite plainly that what in the Court below was spoken of as a rule of the colliery is in reality a statutory regulation applicable to this colliery. The regulation itself is one which is stated in the copy which has been handed up to the Court to be a regulation (regulation 25A) made by the Secretary of State under s. 86 of the Coal Mines Act, 1911. That section by sub-s. 1 provides: "The Secretary of State may by order make such general regulations for the conduct and guidance of the persons acting in the management of mines or employed in or about mines as may appear best calculated to prevent dangerous accidents and to provide for the safety, health, convenience, and proper discipline of persons employed in or about mines," and so forth. Then sub-s. 4 provides: "An order made under this section shall be laid as soon as possible before both Houses of Parliament, and shall have effect as if enacted in this Act." Then s. 88 provides for an abstract of the Act and a copy of such regulations being supplied to every employee, and s. 90 provides for a penalty for breach of the regulations. The effect of these statutory provisions, as it seems to me, is to constitute

this so-called rule a statutory regulation which was binding upon this unfortunate boy.

The learned county court judge has devoted a good deal of his judgment to considering the question whether or not the boy knew that riding on the loads was forbidden. That, no doubt, would be, or might be, a very material consideration if the rule was a colliery rule properly so called, and which might either be a term of the original contract with the boy or a matter which might have been brought to his attention, and might be relied upon as limiting the sphere of his employment although not an original term of his contract. But those considerations, as it seems to me, have no application when it turns out, as it now turns out, that this particular rule so called was a statutory regulation. Being a statutory regulation, the boy was bound by it, and it seems to me that the onus lies on him of showing that he had the permission indicated in the regulations, that is to say, the permission of the manager or under-manager to ride upon the truck. Upon that the learned county court judge seems unable to come to any decision. He could not make up his mind whether the evidence did or did not convince him that such permission had been given. In the absence of a finding by the learned county court judge that such permission had in fact been given, it seems to me that the boy failed to establish that he had any permission to ride upon the truck, and it follows, therefore, that he was bound by the statutory regulation which forbade him to ride upon it.

That brings one to the consideration of the question which Mr. Rigby Swift insisted upon, namely, that, assuming this regulation to be binding upon the boy, still it was not a regulation which limited the sphere of his employment to driving in accordance with the regulation, but was merely a direction to him as to how he should perform his duty as a driver, a breach of which merely amounted to misconduct. Mr. Rigby Swift contended that this case fell within the line of decisions of which *Blair & Co.* v. *Chilton* (1) is one, and the principal one, and not within the line of decisions of which *Barnes* v. *Nunnery Colliery Co.* (2) and *Herbert* v. *Samuel Fox & Co. Co.* (3) are illustrations. The learned county court judge evidently

(1) [1915] W. N. 203; 8 B. W. C. C. 324.

(2) [1912] 1 A. C. 44.

(3) [1916] 1 A. C. 405.

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desired, if he thought it was open to him, to have treated this case as one falling within the decision of *Blair & Co.* v. *Chilton* (1)—he says so; but he says that in his opinion he is bound to treat the case as one falling within the decision of *Barnes* v. *Nunnery Colliery Co.* (2) Whether the case of *Barnes* v. *Nunnery Colliery Co.* (2) is distinguishable on the ground suggested by Mr. Rigby Swift, namely, that in that particular case the trucks upon which the boys were riding were in no way connected with their particular form of employment in the colliery, does not seem to be material to consider or decide, having regard to the later case of *Herbert* v. *Samuel Fox & Co.* (3) I have considered the facts of that case, the decision, and the speeches of the noble and learned Lords as carefully as I can, and it seems to me that that case is a direct authority that this particular statutory regulation is one of the class limiting the sphere of the applicant's employment. I say that, because I cannot distinguish the facts of that case and the facts of this case. The duties of the boy in *Herbert* v. *Samuel Fox & Co.* (4) are stated, in the report of the case in the *Law Reports*, to be "to link up any wagons which required to be moved and then to walk in front of the wagons to keep a proper look-out so as to be able to warn the engine-driver, if necessary, to stop the train." The statement then goes on: "On the day of the accident, after the conclusion of certain operations, the shunting engine was being driven tender first, pushing trucks back to the engine-shed. The appellant, instead of keeping a look-out by walking in front of the first truck, climbed upon the buffer of the truck, holding his shunting pole with both hands," and so on. There is nothing in the report to indicate that the position in which the boy placed himself on the buffer was one which rendered it less convenient for him to give warning to the driver, or was a worse position from which to observe anything in the way in which the trucks were proceeding. Therefore, so far as the duty of keeping a look-out and warning was concerned, upon the facts as stated the one position seems to me to be as good as, if not better than, the other. The difference between the two positions was this, that walking was a safe, or comparatively safe, position and riding was a

(1) [1915] W. N. 203; 8 B. W. C. C. 324.
(2) [1912] A. C. 44.
(3) [1916] 1 A. C. 405.
(4) [1916] 1 A. C. 406.

dangerous, or comparatively dangerous, position. It appears to me that the decision in that case really depended entirely upon that distinction, and I refer to the passage in the judgment of Lord Atkinson (1) where he says: "If there ever was a case in which the act, in the doing of which the accident occurred, was outside the sphere of the workman's employment, it was, I think, this case. He was in a place in which he had been forbidden to be and had no right to be. He was thereby knowingly exposing himself to risks not reasonably incidental to his employment, risks which neither he nor his employers contemplated that he should run, risks which the employer forbade him to run, new perils added by his own rashness." It seems to me, having regard to the facts of that case and to the facts of this case, that that language applies as directly to the facts of this case, as it must be taken to have applied to the facts of that case, and when that language is applied to the facts of this case I think that this appeal must fail.

WARRINGTON L.J. I am of the same opinion.

The workman in this case was a boy employed in the mine as a horse-driver. He met with a serious accident at a time when he was riding on a load drawn by a horse of which he was in charge. The question we have to consider, as has been stated many times, is whether, when the accident occurred, he was doing something which was outside the sphere of his employment, or whether he was merely doing that which he was employed to do in an improper way. In the case of *Herbert* v. *Samuel Fox & Co.* (2) a boy who was employed to walk in front of some railway trucks which were being shunted by an engine pushing them behind, instead of doing so sat upon the buffer of the leading truck, and whilst so doing was injured—he fell from the buffer and the trucks ran over him. The House of Lords, by a majority, in that case, held that what he was doing at the time the accident occurred was not merely an improper act within the sphere of his employment, but that it was outside the sphere of his employment. The facts of that case and the facts of this case are very closely similar to one another. The real question we have to determine is whether or not, on the facts of this case, to ride on the

(1) [1916] 1 A. C. 412. (2) [1916] 1 A. C. 405.

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load was outside the sphere of this boy's employment. There was in force in this colliery, amongst the regulations made by the Secretary of State for the conduct and guidance of persons employed in mines with a view to preventing dangerous accidents and to provide for the safety of such persons, a regulation in these terms: "No person below ground shall ride upon any animal, nor, except by permission of the manager or under-manager, upon any tram, tub, or other contrivance drawn by a horse or other animal." That was a statutory provision having under sub-s. 4 of s. 86 of the Coal Mines Act, 1911, the same effect as if it had been enacted in the Act. It was argued in the case of *Herbert* v. *Samuel Fox & Co.* (1), where there was in force a regulation, not a statutory one, but one made by the railway company, that the regulation in question was nothing more than a rule the violation of which might amount to wilful misconduct, but it was pointed out by Lord Atkinson (2) that the rule there had another and entirely different function, namely, "to fix the limits of the workman's sphere of employment." If in that case the rule had that function, surely the statutory regulation in the present case ought to have that function too, and I think in effect what the regulation does is to render it unlawful for the colliery to employ or for the workman to engage to do that which would involve a breach of such regulation—in other words, that the effect of the regulation is to exclude from the sphere of the boy's employment the doing of that which is prohibited by the regulation. There may, of course, be many rules and regulations of that kind which could not have that effect, but this regulation, in my opinion can only have the effect of rendering it outside the sphere of the employment to do that which this boy was doing. Then, if that be so, the only way in which the boy could have got himself outside the effect of the regulation would have been to establish that what he was doing was done by the permission of the manager or the under-manager, and the onus would be upon him to establish that he had that permission. That he has failed to do. The result, therefore, is that the accident in this case happened because he was doing something which was outside the sphere of his employment, something which was dangerous; and the danger was the very reason why the regulation had been made. Therefore it cannot be said to

(1) [1916] 1 A. C. 405. (2) [1916] 1 A. C. 412.

have been in the contemplation of the employers when they engaged the boy to do that which they engaged him to do.

It seems to me there was ample evidence in this case on which the learned county court judge could come to the conclusion at which he arrived, that the accident did not arise out of or in the course of the boy's employment. The appeal fails and must be dismissed.

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Appeal dismissed.

Solicitors: *Stow, Preston & Lyttelton, for Hollinshead & Moody, Tunstall; Davenport, Cunliffe & Blake, for Knight & Sons, Newcastle, Staffordshire.*

W. I. C.

HARRISONS & CROSSFIELD, LIMITED *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

1917 *July* 6, 9, 12.

[1916 H. 2177.]

Carrier—Theft by Servant—Prosecution by Carrier—Action against Carrier—Ratification—Estoppel.

A firm of tea merchants sent a consignment note to their wharfingers, requesting them to deliver three chests of tea to a railway company who were to carry the tea and deliver it to certain purchasers. A carter, who was or had been in the service of the railway company, but who at the time was absent from work on sick leave, presented himself at the wharf in a uniform and with a horse and cart of the railway company and demanded and received the tea, which he then converted to his own use. The railway company afterwards prosecuted him to conviction for larceny, laying the property in the tea in themselves.

In an action by the tea merchants against the railway company for breach of duty as common carriers:—

Held, in the absence of negligence, that the defendants were not liable, inasmuch as, though they had ratified the de facto possession of the tea by the carter, they had not ratified any possession under a contract of carriage.

TRIAL of action before Rowlatt J. without a jury.

The plaintiffs were tea merchants. The defendants were common carriers of goods for hire.

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The plaintiffs by a consignment note dated December 10, 1915, requested the defendants in the course of their business as common carriers to collect for the plaintiffs three chests of tea from Buchanans' warehouse, Wapping, and to carry the same to Belmullet, county Mayo, Ireland, and there deliver them to MacIntyre's Stores.

On December 21, 1915, one William Henry Bailey, who was then or had been up to then in the defendants' service, but was at the time absent from work on sick leave, called at Buchanans' warehouse in the uniform of a carter in the defendants' employment, and with a horse and cart belonging to the defendants, and asked for and obtained the chests of tea, which he then converted to his own use.

Paragraph 4 of the plaintiffs' points of claim was as follows:—"If and so far as the said Bailey was not the defendants' agent to accept and receive the said goods as aforesaid at the time of the said acceptance and receipt the said Bailey purported so to accept and receive the said goods as the defendants' agent, and the defendants subsequently on or about February 24, 1916, at the County of London Sessions prosecuted to conviction the said Bailey for stealing the said tea from themselves, the defendants, after it had been so accepted and received as aforesaid and claimed the property in the said tea to be in themselves, and again on or about April 11, 1916, at the County of London Sessions prosecuted to conviction one A. Bowman for being concerned in the stealing of the said tea from themselves, the defendants, and again claimed the property in the said tea to be in themselves and thereby ratified the said acceptance and receipt as an acceptance and receipt on their behalf and ratified the said agency."

The plaintiffs claimed 33*l.* 2*s.* 9*d.*, the value of the tea.

George Wallace, K.C., and *A. F. Wootten*, for the plaintiffs.

Eustace Hills and *St. J. Hutchinson*, for the defendants.

The arguments sufficiently appear from the judgment.

July 12. ROWLATT J. read the following judgment:—In this case the plaintiffs sue the defendants for the value of a parcel of tea on the footing that the tea was delivered by Messrs. Buchanan, the plaintiffs' wharfingers, to the defendants for carriage and has been lost by them. In fact the tea was obtained from the

wharfingers by one Bailey by fraud without the authority of the defendants. Bailey came on December 21 with a van of the defendants and in their uniform and collected the tea from the plaintiffs' wharfingers, who gave it to him for carriage (as they believed) by the defendants. The plaintiffs had some ten days before sent a consignment note including these goods, and Bailey called in pretended pursuance of this note. His action was, however, wholly fraudulent, his intention, which he succeeded in carrying out, being always to convert the tea to his own use. He was at the time in the service of the defendants as vanman, but was absent from duty sick, and his possession of the van was wrongful.

In these circumstances, apart from anything else, there could be no liability on the part of the defendants. It was suggested that the defendants might be liable on the ground that they had been guilty of actionable negligence in having had in their service a man capable in his hours of leisure of the conduct of Bailey. I need say no more of this suggestion than that Mr. Wallace of course gave it up. It is said, however, that the defendants have made themselves liable by what they did afterwards. On February 2, after the goods had been made away with by Bailey, the defendants prosecuted him for larceny as from themselves, and the property was laid in them. This, it is said, is an adoption of the possession by the defendants while the goods were in fact in Bailey's hands and constitutes a ratification of his action in obtaining the goods from the plaintiffs, and whether this is so is the point in the case.

Let me in the first place clear away one difficulty that was suggested. It was said by Mr. Hills, for the defendants, that no one can ratify a criminal act, but I do not think that in this case we are involved in the discussion of that question. It may be that a person cannot ratify an act when the ratification involves the adoption of a criminal element in it, but here it is not argued that the defendants adopted the fraud but only the possession. Supposing that the defendants had found Bailey in the possession of the goods and had taken them from him and carried them towards their destination as desired by the plaintiffs, they would have ratified his action in obtaining them and carried out honestly the mandate which he intended dishonestly to disregard. Would there

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have been any reason why they should not? I am at a loss to see any. Therefore I am of opinion that there is no ground for the argument that the defendants could not ratify the action of Bailey in obtaining these goods. The question is whether they did.

Now, ratification does not rest upon estoppel. It need not be communicated to the party alleging it. Ratification is a unilateral act of the will, namely, the approval after the event of the assumption of an authority which did not exist at the time. It may be expressed in words or implied from or involved in acts. It is implied from or involved in acts when you cannot logically analyse the act without imputing such approval to the party, whether his mind in fact approved or disapproved or wholly disregarded the question. In the present case it cannot be suggested that the defendants after the goods disappeared in fact approved of the assumption by Bailey of authority to collect them from the plaintiffs. What is contended is that their action in his prosecution necessarily involved such approbation. Mr. Hills contended that nothing that they did was relevant in any sense, that the barest possession is sufficient to sustain a charge of larceny, and that all that they did was to affirm that the goods were in their van. I think that they did affirm that the goods were in their possession—in what character I will consider in a moment; but it seems to me they did affirm their possession, and this in a very unequivocal way, for they called upon the criminal law to punish Bailey on the footing of such possession for a crime which was different from his crime in fraudulently taking the goods from the plaintiffs' possession. Whether Bailey could have objected in the prosecution that they could not change the form of his guilt by an election ex post facto I do not pause to inquire, but for the purpose of determining whether they adopted the possession I think their action is as conclusive against them as the civil action taken by parties put to an election of a different kind referred to by Lord Blackburn in *Scarf* v. *Jardine*. (1)

But now arises the vital question: In what character did they adopt the possession? Mr. Wallace treated it as necessarily following that they adopted the possession which Bailey obtained, namely, possession under a contract of carriage. But this, I think, is not so. It is essential to note with complete accuracy exactly what

(1) (1882) 7 App. Cas. 345, 361.

they did, and this was to take the position that Bailey's possession after he obtained the goods and immediately before he made away with them was their possession—no more. Now, supposing that they had actually found Bailey in possession of these goods, they might have called upon him as their servant or as purporting to act as such to give them up to them. In doing this they might have adopted his possession, but not necessarily the contract for carriage which he had purported to make. They might merely have taken them in order to send them back to the owners repudiating the contract.

Again, finding Bailey in possession, they might have ordered him to take them back to the owners. They would have made his possession their own, but would not have made themselves carriers of the goods. These considerations suffice, in my judgment, to show that the position taken in the prosecution does not involve the ratification of the contract of carriage. The argument is in the last degree technical, and must be conclusive in every stage. It fails because possession in the circumstances can be affirmed without affirming possession as carriers. All that the defendants necessarily ratified was a bare bailment. On this footing they cannot be made liable merely for non-delivery, but only for negligence or for some default on the part of a servant acting in the course of his employment. There is nothing of this sort. It must depend on the facts. Ratification has no bearing here. Its operation is exhausted when it is determined that Bailey's possession is to be regarded in law as the defendants' possession to the minimum extent required to satisfy the law of larceny. It does not put Bailey in the position of acting in the course of his employment when he feloniously made away with the goods, nor does it create for legal purposes a fictitious state of facts revealing negligence where there was none. These considerations may seem subtle, but the argument itself is unreal. There might be a shorter answer to it, but, taking it as put forward, I think it fails on analysis.

The action must be dismissed, with costs.

Judgment for defendants.

Solicitors for plaintiffs : *E. F. Turner & Sons.*
Solicitor for defendants : *M. C. Tait.*

W. H. G.

1917
May 24;
July 12.

COMMISSIONERS OF INLAND REVENUE *v.* TRUSTEES OF THE SETTLED ESTATES OF THE RIGHT HON. HUGH CECIL, EARL OF LONSDALE.

Revenue—Excess Mineral Rights Duty—Pre-war Rent Value—"Average prices governing payment of rent"—Finance (No. 2) Act, 1915 (5 *& 6 Geo.* 5, *c.* 89), *s.* 43, *sub-ss.* 1, 2.

By s. 43 of the Finance (No. 2) Act, 1915, where rent varies as the price of minerals and exceeds the pre-war standard of that rent there shall be paid by the person to whom the rent is payable an amount equal to half the excess. The pre-war standard is the average of two pre-war rent values. The pre-war rent value for either of those years is "the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year."

By the terms of a lease the lessee was to pay a certain royalty per ton when the average selling price of coal did not exceed 6*s.* 6*d.* per ton. When the average selling price exceeded 6*s.* 6*d.* per ton the royalty was to be increased by one-tenth of the excess. On April 14, 1914, before the commencement of the war, the parties agreed to raise the basis of the average selling price from 6*s.* 6*d.* to 7*s.* 6*d.* per ton:—

Held, that the basis of 6*s.* 6*d.* per ton fixed by the lease was one of "the average prices governing the payment of the rent" in the pre-war years, and that the pre-war rent values must be arrived at by ascertaining what the tonnage raised in the accounting year would have yielded by way of royalties in the pre-war years, taking 6*s.* 6*d.*, and not 7*s.* 6*d.*, as the basis of the average selling price in those years.

Appeal from the decision of a referee under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), and s. 43 of the Finance (No. 2) Act, 1915 (1), as to the amount of excess mineral

(1) Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 43: "(1.) Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves (in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business) varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid, either directly or by deduction, by reference to the amount of the rent paid in that working year, by that person (in this section

rights duty payable by the respondents, the trustees of the Earl of Lonsdale's settled estates, under the last-mentioned section.

The parties agreed in the following statement of facts:—

1. By an indenture of lease dated May 1, 1903, and made between the Right Hon. Hugh Cecil, Earl of Lonsdale, of the first part the Right Hon. James Lowther, M.P. (the then trustee of the settled estates of the said Earl), of the second part, and the St. Helen's Colliery and Brickworks Company, Limited, of the third part, certain coal mines and deposits of coal under lands (including foreshore) situate in the borough of Workington and the parishes of Seaton and Flimby, Cumberland, were demised to the company for a term of fifty-nine years (less three days) from January 1, 1903, at the yearly dead or certain rent of 1000*l.* payable half-yearly, and the lease provides that this dead rent shall merge in the following royalty rents specified in the schedule to the lease:—

When the average selling price of the coal does not exceed 6*s.* 6*d.* per ton:—

For coal from the Main Band	..	A royalty of 6*d.* per ton
For coal from Bannock Band, otherwise Ten Quarters	..	„ 5*d.* „
For coal from other seams	..	„ 3*d.* „

referred to as the person liable) an amount equal to fifty per cent. of that excess.

"(2.) The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer, ...

"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year . . . ."

"(5.) Any duty payable under this section shall be assessed by the Commissioners of Inland Revenue on the person liable, subject to the same appeal as that to which an assessment of duty by the Commissioners under Part I. of the Finance (1909-10) Act, 1910, is subject, and shall be recoverable as a debt due to His Majesty from that person.

"(6.) Subsection (3.) of section twenty of the Finance (1909-10) Act, 1910, shall extend so as to authorise particulars to be required of any lease of minerals or wayleaves and as to the sums paid or payable thereunder, and of such other particulars as to the minerals or wayleaves as the Commissioners may require for the purpose of this section . . . ."

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When the average selling price exceeded 6*s.* 6*d.* per ton the above royalties were to be increased by one-tenth of the excess above 6*s.* 6*d.* per ton of such average selling price. "The average selling price" is defined by the lease, a copy of which forms part of this statement.

2. The dead rent has been always exceeded by the tonnage royalties, and the amount of the dead rent does not affect the present question.

3. The basis selling price of 6*s.* 6*d.* fixed by the lease has also been exceeded at all material times. Before the commencement of the present war, i.e., on April 23, 1914, as a result of negotiations for a reduction in the royalties payable by the company, the trustees agreed to make to the company as from January 1, 1914, a reduction in the royalties, and this was effected by raising the basis selling price of 6*s.* 6*d.* fixed by the lease to 7*s.* 6*d.* per ton, the trustees thus making as from January 1, 1914, a reduction of one-tenth of 1*s.* per ton in all the royalties payable under the lease when the selling price is 7*s.* 6*d.* or upwards. The Commissioners had no knowledge of this agreement until the return dated March 22, 1916, referred to in paragraph 6 below, was received from the trustees.

4. This increased basis selling price of 7*s.* 6*d.* has always been exceeded since January 1, 1914.

5. The trustees' royalty account for the half-year ending June 30, 1914, was, and all subsequent accounts have been, made up and the royalties charged on the basis of the agreement mentioned in paragraph 3 hereof.

6. On January 26-27, 1916, the Commissioners served notice on the trustees' agent at Whitehaven requiring particulars under the statute as to excess mineral rights duty, and on March 22, 1916, particulars were furnished by the agent.

7. The year ending December 31, 1914, is the first accounting year.

8. The two years immediately preceding the first accounting year, i.e., the years ending December 31, 1912, and December 31, 1913, were under s. 43, sub-s. 2, of the Finance (No. 2) Act, 1915, selected by the agent for the purpose of finding the pre-war standard for the return. That selection is not affected by the matter in dispute, i.e., the method of computing the pre-war rent values.

In the particulars referred to in paragraph 6 hereof the average rate of royalty payable in the selected pre-war years for each seam was required by the Commissioners and was furnished by the agent. The average rate of royalty so furnished was calculated according to the terms of the lease unmodified by the agreement mentioned in paragraph 3 hereof.

9. The Commissioners on April 28, 1916, served upon the trustees' agent the computations of liability to excess mineral rights duty for the years 1914 and 1915 which are herewith and marked B^1 and B^2. In these computations the Commissioners calculate the pre-war standard of rent by reference to the terms of the lease as modified by the agreement referred to in paragraph 3 hereof.

10. A copy of the Commissioners' letter of April 27, 1916, accompanying these computations and of the subsequent correspondence between the Commissioners and the trustees' agent, consisting in all of seven letters, is herewith marked C.

11. The Commissioners' computations accept the agent's tonnage figures for 1914 and 1915, but do not accept his average rates of royalty for the selected pre-war years, though these were the rates actually paid for the selected years.

12. "Rate of royalty" in this and the next paragraph means alternatively—(1.) the rate fixed by the schedule to the lease (see paragraph 1 above); (2.) that rate as altered by the agreement referred to in paragraph 3 above. These rates are referred to as "rate of royalty (1.)" and "rate of royalty (2.)" respectively. The Commissioners and the trustees agree that to arrive at the pre-war standard of rent as defined by the Finance (No. 2) Act, 1915, s. 43, it is necessary to divide by 2 the sum of the two selected pre-war rent values, that is the pre-war rent value of 1912 and the pre-war rent value of 1913. The method of calculation of these pre-war rent values for 1912 and 1913 is the matter in dispute in this case.

The Commissioners contended that those pre-war rent values had to be arrived at as follows:—Take the tonnage for each year of account, namely, 1914 and 1915; ascertain what that tonnage would have brought in by way of royalty in the selected years 1912 and 1913 if "rate of royalty (2.)" were applied to the average prices of coal in 1912 and 1913 respectively.

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The trustees contended that the pre-war rent values for 1912 and 1913 respectively must be arrived at by taking the tonnage for 1914 and 1915 respectively and ascertaining what that tonnage would have paid by way of royalty in the selected years 1912 and 1913 if "rate of royalty (1.)" were applied to the average selling prices of coal in 1912 and 1913 respectively.

13. [This paragraph set out (1.) the number of tons of coal worked and chargeable with royalty rents during the first and second accounting years ending December 31, 1914, and December 31, 1915, respectively; (2.) the average selling prices of the coal calculated in accordance with the provisions of the lease in each of the two selected years immediately preceding the first accounting year, namely, the two years ending December 31, 1912, and December 31, 1913; (3.) the royalties payable on the tonnage of coal worked during the first and second accounting years, 1914 and 1915, respectively according to the average selling prices of the two selected pre-war years, 1912 and 1913, respectively for each of the selected years—(*a*) applying "rate of royalty (2.)," which brought out the Commissioners' pre-war standard of rent for 1914 as 4222*l.* 7*s.* 10*d.* and for 1915 as 3780*l.* 18*s.* 6*d.*, (*b*) applying "rate of royalty (1.)," which brought out the trustees' pre-war standard of rent for 1914 as 4988*l.* 9*s.* 8*d.* and for 1915 as 4470*l.* 6*s.* 2*d.*] . . . .

15. The Commissioners on June 7, 1916, served on the trustees' agent the notices of assessment to excess mineral rights duty for 1914 and 1915, marked D^1 and D^2 herewith. These assessments are based on the Commissioners' computations of liability already referred to. The trustees thereupon gave notice of appeal against the assessment for each of the years 1914 and 1915. Copies of these notices accompany, marked E^1 and E^2.

16. The trustees have never disputed, and do not now dispute, their liability for excess mineral rights duty computed on the pre-war standards of rent set out in paragraph 13 (3.) (*b*) if any liability for such duty is in fact imposed by the said Act.

Sir Gordon Hewart, S.-G., and *Sheldon*, for the Crown.
Langdon, K.C., and *W. Allen*, for the trustees.

July 12. LUSH J. read the following judgment:—In this case I have to interpret a somewhat obscure section in the Finance (No. 2)

Act, 1915, s. 43. That section forms one of a group of sections which provide for the payment of duty on excess profits. Sects. 38 to 42 deal with excess profits made in certain trades or businesses, and impose a duty on such excess profits. This section deals with excess payments received by way of royalties on minerals, and imposes a duty on such excess payments. The two classes of cases, though different in detail and in treatment, are analogous in character. The method adopted in ascertaining the excess payments received in respect of mineral rights on which the duty is imposed is this. The section commences in this way—I will leave out the words that are immaterial to the present case: "Where the amount payable to any person as rent in respect of the right to work minerals . . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid . . . ."; and then it goes on to define the amount of the debt. Then sub-s. 2: "The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values . . . ." The second clause of that sub-section says: "The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." The dispute in the present case turns upon the last few words in sub-s. 2. It arises in this way: The trustees of the Earl of Lonsdale on May 1, 1903, demised certain coal mines to St. Helen's Colliery and Brickworks Company, Limited, for a long term of years in consideration of a dead rent of 1000*l.* (which was to merge in the royalties specified in the schedule to the lease) and the payment of the specified royalties. The schedule is as follows: "When the average selling price of coal the produce of the demised minerals at the pit's mouth during the half year"—I need not read what follows; it describes the mode of ascertaining what the average selling price of the coal is—"does not exceed 6*s.* 6*d.* per ton . . . ."; then in respect of the first seam mentioned, the "Main Band," 6*d.* is the amount of

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royalty rent per ton which is payable by the lessees; in respect of the next seam 5*d.*, and "other seams" 3*d.*: "When the average selling price ascertained as aforesaid of coal the produce of the demised minerals at the pit's mouth during such half year exceeds 6*s.* 6*d.* per ton each of the above royalties to be increased by one-tenth of the excess above 6*s.* 6*d.* per ton of such average selling price"; and then it describes what is to be included in the calculation. The basis selling price of 6*s.* 6*d.* which was fixed by the lease has, as appears from the very useful "statement of facts" which was agreed between the trustees and the Commissioners of Inland Revenue for the purpose of this litigation, always been exceeded during the material years. In April, 1914—three or four months, that is, before the commencement of the war—as a result of lengthy negotiations, the trustees agreed to make a reduction in the royalties as from the beginning of that year, and they did so by raising the 6*s.* 6*d.* to 7*s.* 6*d.* The effect of this alteration was to diminish the royalties to be paid to the trustees by one tenth of 1*s.* per ton if the price of coal exceeded 7*s.* 6*d.*, which it has always done.

The trustees, being required to furnish particulars for the two post-war or accounting years 1914 and 1915, selected for the calculation of the pre-war standard the two preceding years 1912 and 1913. In order to ascertain the pre-war rent value of the pre-war years they proceeded as follows: They took the number of tons of coal of the three seams on which royalties were paid in each of the accounting years 1914 and 1915, and calculated what those royalties would have amounted to if based on the actual rates of royalty in operation in each of the preceding years in question, working on the 6*s.* 6*d.* basis, which was then in operation, and taking the average prices of the coal during each of such years. The Commissioners of Inland Revenue objected to this method, and contended that to comply with the provisions of the section the rate of royalty must be taken as it was in the accounting years; 7*s.* 6*d.*, therefore, being taken as the basis, and not 6*s.* 6*d.* The result of this would of course be to diminish the amount of the royalties for the preceding year and therefore increase the excess. The trustees declined to comply with this view, and the dispute was referred to arbitration. The referee held that the trustees'

contention was right, and the Commissioners appealed. I have to say whether the contention of the trustees is right or wrong. That depends on what is the true meaning of the last part of clause 2 of sub-paragraph 2 of s. 43.

I am of opinion that the trustees' contention is right and that the decision of the referee should be affirmed. The words "in that year" at the end of the second clause of sub-s. 2 clearly, in my opinion, refer to the preceding year in question, and not to the accounting year. The whole scheme and sense of the section makes this clear, and the language used when construed grammatically shows it also, as the section deals primarily with each of the preceding years, and the words "in that year" would naturally refer to the year so dealt with. This was not, I think, questioned. The real discussion when the case was argued before me was as to the meaning of the words "average prices governing the payment of the rent." The Solicitor-General contended that the prices referred to (I will deal later with the effect of the word "average") are the prices at which the coal was sold during the material period, and that the section means this, that one has to ascertain the sum to which the rent, which varies according to price,—i.e., really the royalties—would amount if the selling prices of coal in the pre-war years were applied to the tonnage raised in the accounting year, the object being to impose a duty if the price of the coal had risen. He said that one has nothing to do with the actual rate of the royalty, and that if the trustees chose to alter it in the accounting year it would not affect the problem: the rate must be constant for the year before and the year after the war. In my opinion that is not the correct view. It would have been quite easy to say "if the prices of coal had been the same as in that year" if that had been intended. What one has to ascertain, according to the requirements of the section, is what would the rent (i.e., the royalties) in the post-war year amount to if based upon the "average prices" governing the payment of the rent in the pre-war year. In other words, the average prices which governed the payment of rent in the one year are to be taken as the basis of the calculation of the rent in the other year. The prices at which the coal was sold are not the only factor which governed the payment of the rent in the pre-war year. The other factor is the basis figure which the

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parties adopted—what may be called the normal or conventional figure after which an increased royalty or rent was to be paid. The amount to be paid depended on both these factors, and not on the first alone. It may be that the words "average prices of mineral" would prima facie, and apart from context, refer to selling price, but they cannot, in my opinion, do so with this context and in this section. The 6*s.* 6*d.* itself is an average price of the coal, and it is one of the average prices which govern the payment of the rent in 1912-1913, and on which that rent was based. This is, in my opinion, a reasonable construction to be placed upon the section giving to the words their fair and natural meaning. It may well be that if this construction would bring about an unreasonable result and one contrary to the obvious intention of the Legislature one might without doing undue violence to the language adopt the other construction, but so far from the construction, which I think is the right one, bringing about an unreasonable result, it is, I think, the more reasonable one. It is true that this is not an excess profit duty in the strict sense, but the section is one which deals with matters in pari materia with excess profits; and, if the contention of the Crown is right, excess duty might be payable when the royalties in the post-war year were less than those in the pre-war year and the lessor had made a loss. It was, of course, admitted that the new agreement was made in the ordinary course of business. The construction which I have placed on this section brings this case into harmony with that of a business on which excess profits have been made, as in that case losses in the business may be set off as is provided by s. 38, sub-s. 3, of the Act.

The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for the trustees: *Rawle, Johnstone & Co., for Howson & Dickenson, Whitehaven.*

W. H. G.

BRITISH AND FOREIGN STEAMSHIP COMPANY, LIMITED v. THE KING.

1917
July 10, 11, 13.

[B. 447.]

Shipping—Steamship requisitioned on Terms contained in Charterparty between Owners and Admiralty—Absence of Navigation Lights in Pursuance of Admiralty Instructions—Collision—Liability of Admiralty for Loss of Ship—"Consequences of warlike operations"—"Cause arising as a sea risk."

A steamship was requisitioned by the Director of Transports and was taken into the service of the Admiralty on the terms of a charterparty under which it was provided that "the Admiralty shall not be held liable if the vessel shall be lost . . . . in consequence of . . . . any . . . . cause arising as a sea risk," but the Admiralty took the risk of "all consequences of hostilities or warlike operations." In pursuance of instructions from the Admiralty the steamship, upon a very dark night, was steaming with her lights obscured when she sighted on her starboard bow a French battleship. The battleship was steaming without lights, but almost immediately disclosed them. The steamship ported her helm and disclosed her port light, and the battleship almost simultaneously starboarded her helm. They were thus brought on to courses forming intersecting circles, and a collision occurred which caused the steamship to sink and become a total loss. It was admitted that in the circumstances neither vessel was to blame:—

Held, that the loss of the steamship was "a consequence of warlike operations" and not "in consequence of any cause arising as a sea risk," and that the Admiralty was therefore liable for the loss.

Ionides v. *Universal Marine Insurance Co.* (1863) 14 C. B. (N.S.) 259 distinguished.

PETITION OF RIGHT tried before Rowlatt J. sitting as commercial judge.

The suppliants were the owners of the steamship *St. Oswald*. In March, 1915, the *St. Oswald* was requisitioned by the Director of Transports and was taken into the service of the Admiralty on the terms of a charterparty in Form T. 99c, which was sent by the Admiralty to the suppliants.

By clause 21 of the charterparty it was provided that "The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorized by them, and shall in all respects comply with the confidential instructions for masters of

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transports, but he shall be solely responsible (on behalf of the owners) for the management, handling, and navigation of the ship."

By clause 24, "The Admiralty shall not be held liable if the vessel shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk."

By clause 25, "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extended clause: 'Warranted free from . . . . all consequences of hostilities or warlike operations, whether before or after declaration of war. Such risks are taken by Admiralty on the ascertained value of the steamer if she be totally lost at the time of such loss.'"

On December 31, 1915, the *St. Oswald* was engaged as a transport in the Eastern Mediterranean. She was employed in the evacuation of troops from Gallipoli, and she, about 5.30 P.M., left the harbour at Imbros bound for Helles, Gallipoli, with no navigation or other lights showing, in pursuance of orders and instructions from the Admiralty. Her side lights were in position and were lighted, but obscured by canvas coverings, and her masthead light was ready lighted, but was not hoisted or showing. After she had rounded Cape Kephalo off the harbour at Imbros a course was set south-east half-south magnetic, and in obedience to her orders she went at full speed for Helles. The night was very dark and a good look-out was being kept on board. Shortly afterwards the hull of a large vessel, which proved to be the French battleship *Suffren*, was seen on the *St. Oswald's* starboard bow about half a mile away approaching rapidly. The *Suffren* sighted the *St. Oswald* on her port bow. When first sighted the *Suffren* was steaming without lights, but almost immediately disclosed them. The *St. Oswald* ported her helm, and the canvas was taken off her port light, and almost simultaneously the *Suffren* starboarded her helm. The *Suffren* soon afterwards struck the *St. Oswald* with her ram on the port side well forward of amidships, causing the *St. Oswald* to sink and become a total loss. The suppliants alleged, and the Attorney-General did not dispute the allegation, that the ramming and loss of the *St. Oswald* could not have been avoided by any reasonable care or skill.

They alleged that the loss owing to navigating without lights was a consequence of warlike operations. The value of the *St. Oswald* at the time of her loss was 102,500*l.*, and the suppliants by their petition alleged that they were put to an expense of 86*l.* 6*s.* for the repatriation of the crew and had lost the interest on the said sums, and claimed to be entitled to have payment made to them of the said sums with interest in pursuance of the contract.

By the answer of the Attorney-General, on behalf of the King, it was alleged (inter alia) that the *St. Oswald* was lost by reason of a cause arising as a sea risk, namely, a collision within the meaning of clause 24 of the charterparty; and the allegations of the suppliants as to the value of the *St. Oswald* and the expense to which they had been put were denied. Their claim for interest was also disputed.

Leslie Scott, K.C., *Roche, K.C.*, and *A. T. Miller*, for the suppliants. The question whether the vessel was lost by marine or by war perils depends upon the circumstances under which she was sailing without lights. Steaming without lights in the present case was a warlike operation, and was the proximate cause of the loss. If one vessel, in order to avoid a torpedo from an enemy submarine, were suddenly to change her course and thereby come into collision with another vessel, the loss would clearly be caused by hostilities. In *France, Fenwick & Co.* v. *Merchants Marine Insurance Co.* (1) the collision was a consequence of negligent navigation. *Ionides* v. *Universal Marine Insurance Co.* (2) is distinguishable; there the proximate cause of the loss was a peril of the sea; this is the converse case. In *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (3) the torpedo fired by the hostile submarine was held to be the proximate cause of the loss. [They referred to *Krüger & Co.* v. *Moel Tryvan Ship Co.* (4) and *Drydale* v. *Lovering.* (5)]

Sir F. E. Smith, A.-G., and *Ricketts*, for the Crown. It is not disputed on behalf of the Crown that steaming without lights was a warlike operation, but the suppliants have wholly failed to make out that that warlike operation was the proximate cause of the loss.

(1) [1915] 3 K. B. 290.
(2) 14 C. B. (N.S.) 259.
(3) [1917] 1 K. B. 873.
(4) [1907] A. C. 272.
(5) (1875) L. R. 10 C. P. 196.

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The ultimate cause was merely the collision, though it may be admitted that the absence of lights was a contributory cause. *Ionides* v. *Universal Marine Insurance Co.* (1) is a conclusive authority in favour of the Crown. The absence of lights cannot be said to be the decisive cause of the loss. It is not enough that the absence of lights was a cause of the loss. It must be the decisive cause.

Cur. adv. vult.

July 13. The following judgment was read by

ROWLATT J. In this case on December 31, 1916, the suppliants' ship was rammed and sunk by the French warship *Suffren* while steaming at night without lights from Imbros to Cape Helles in order to take part in the removal of our forces. She was at the time under requisition to the Admiralty upon the terms of a form of charterparty which contained the following clauses: [Having read clauses 24 and 25 of the charterparty above set out, his Lordship continued:]

The question I have to decide is under which of these clauses the loss in this case falls. The ship was of course lost by collision, but if that collision was the proximate consequence of warlike operations the case falls within the war risks clause. That is the result of what was laid down in *Ionides* v. *Universal Marine Insurance Co.* (1) There the ship was lost by stranding, and the proximate cause was not the hostilities, but the master's being out of his reckoning. But the illustrations given by Erle C.J. show that if the vessel had been caused to strand by hostilities the proximate cause of the loss would have been, not the stranding, but the hostilities. The war risks clauses take out of the operation of the marine risks clause the cases where the marine risk of stranding (or in this case of collision) is actuated by the hostilities. It is a consequence of the hostilities. This differentiates a case of this kind from cases where there are not two clauses. A loss due to a leak caused by a rat gnawing a pipe is a loss by perils of the sea, but if there had been a clause taking out of the exception of perils of the sea consequences of gnawing by rats I take it the loss would have been due to such a consequence. I have therefore to determine whether the collision here was the conse-

(1) 14 C. B. (N.S.) 259.

quence of the steaming without lights by the suppliants' ship and the *Suffren* on this night, which the Attorney-General admitted was a warlike operation. The judgment of Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (1) shows that that means the proximate consequence. Now these vessels sighted each other at a distance of about half a mile, traversable, at their combined speeds, in a minute and a half. The significance of the distance separating moving objects approaching one another is relative to their size and speed. Here the *St. Oswald* sighted the *Suffren* on her starboard bow. The *Suffren* must have sighted the *St. Oswald* on her port bow, for her port light was seen. That was the position in which warlike operations had placed these vessels. If both had kept their course there probably would have been a collision. Both, at any rate. thought so. If both had starboarded or both ported, or if one had kept her course and the other either starboarded or ported, they would have gone clear. As it happened one starboarded and the other ported, and this practically simultaneously. They thus were brought on to courses forming intersecting circles and so collided. The Attorney-General declined to affirm (and I asked him specifically as to the *Suffren*) that either vessel did wrong under the circumstances. He merely said it was not affirmatively proved that the collision was the consequence of the warlike operations. It seems to me that the true view is that these vessels were in instant peril as the consequence of warlike operations, and that the manœuvres which they executed did not constitute an intervening cause of the collision, but are to be regarded merely as an attempt which failed to escape from the existing peril. It is the converse of the position in *Ionides* v. *Universal Marine Insurance Co.* (1), where the absence of the lights merely prevented the master correcting his already mistaken course. If I could say that the *Suffren* was to blame for starboarding I should have held that the negligence of her commander had intervened and immediately caused the disaster. As it was I think the warlike operations brought the vessels into a position where escape or destruction depended upon sudden action, which might be fortunate or disastrous, but which had to be taken, It is all a consequence of the warlike operations. It might have turned out otherwise, but that is only saying that the consequence

(1) 14 C. B. (N.S.) 259.

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Rowlatt J.

might have been different. If the *Suffren* had run down the *St. Oswald* without seeing her at all it could be said she might have missed her. The circumstance that the commander of the *Suffren*, constrained to instant action as a consequence of warlike operations, took of two courses open to him the one which turned out to be the fatal one does not break the chain of consequence. That is just what steaming without lights brings about. That is why it causes losses, namely, because it prevents ships seeing each other until it is too late to ensure safety though by good fortune they may escape.

For these reasons I think the suppliants are entitled to judgment with costs for a sum to be ascertained by a method which will be agreed, failing which there will be liberty to apply.

Judgment for suppliants.

Solicitors for suppliants: *Lightbound, Owen & Co.*
Solicitor for Crown: *Treasury Solicitor.*

J. E. A.

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July 13.

[IN THE COURT OF APPEAL.]

TARR *v.* CORY BROTHERS & CO., LIMITED.

Employer and Workman—Compensation—Weekly Payment—Application to review—Change of Circumstances—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., clauses* 3, 16.

Upon an application to review a weekly payment in a case of partial incapacity under Sched. I., clause 16, of the Workmen's Compensation Act, 1906, the fact that since the last award there has been a substantial alteration in the rate of wages common to the trade in which the workman is employed is one which the arbitrator is not only entitled but bound to take into consideration. Such an alteration is a change of circumstances which gives jurisdiction to entertain an application to review.

Dicta of Cozens-Hardy M.R. and Buckley L.J. in *Radcliffe* v. *Pacific Steam Navigation Co.* [1910] 1 K. B. 685 disapproved.

Bevan v. *Energlyn Colliery Co.* [1912] 1 K. B. 63 applied.

APPEAL from an award of the judge of the Bridgend County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The award appealed from was made upon an application by the employers, the respondents, to review a weekly payment made under the Act. The workman, Tarr, was injured by accident while employed in the respondents' colliery. At the time of the accident he was earning 2*l.* 8*s.* 1*d.* per week. He was partially incapacitated by the accident, but afterwards obtained light work with the respondents at 1*l.* 6*s.* 1*d.* per week, and for some time he was paid compensation at the rate of 11*s.* per week, being half the difference between his wages before and after the accident. In May, 1915, the miners of the South Wales coalfield became entitled, under Lord St. Aldwyn's award, to a war bonus, which in Tarr's case amounted to 3*s.* 2*d.* per week. The employers then reduced the compensation to 9*s.* 5*d.* On September 25, 1915, under the terms of the Conciliation Board agreement of September 2, 1915, Tarr's wages were increased to 1*l.* 12*s.* 5*d.*, whereupon the employers reduced the compensation to 7*s.* 10*d.* Tarr then applied for a review, and the judge increased the compensation to 9*s.* a week. A further increase in wages then took place under the Conciliation Board agreement, and Tarr's wages became 1*l.* 15*s.* 5*d.* per week. The employers then applied for a review, claiming that the weekly payment should be reduced from 9*s.* to 7*s.* 6*d.* The county court judge held that the fact that there had been a general rise in wages constituted a change of circumstances which ought to be taken into consideration upon an application for review and made his award accordingly. The workman appealed.

Disturnal, K.C., and *Slesser*, for the appellant. Whatever may be the correct view as to fixing the amount of the weekly payment in a case of partial incapacity under Sched. I., clause 3, of the Act of 1906 in the first instance, there cannot be a review under clause 16 of the schedule unless there has been a change of circumstances. A general alteration in the rate of wages common to the trade is not such a change of circumstances, though no doubt if a workman obtains an increase of wages owing to his own skill or efficiency that would amount to a change of circumstances which would justify an application to review. In this case the county court judge had no jurisdiction to entertain the application, and if he had jurisdic-

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tion he has not properly exercised it. He had no right to have regard to the alteration in wages which was common to the whole of the colliers in the district. When the judge fixed the amount of the weekly payment at 9*s*. he must be taken to have considered the probability of fluctuations in the rate of wages. The real test is how far the workman's earning capacity has been decreased. The judge has not treated the matter from that point of view. He has only regarded the general rise in wages which is due to economic causes which do not touch the workman.

In *Radcliffe* v. *Pacific Steam Navigation Co.* (1) Cozens-Hardy M.R. said that " great care must be taken not to allow the fluctuations of the general labour market to justify a review " ; and Buckley L.J., in the same case, said that fluctuations in the labour market ought not to be taken into consideration. (2) It is true that those are only dicta, but the observations are strictly relevant to the present case.

In *Bevan* v. *Energlyn Colliery Co.* (3) it was decided that in originally fixing the amount of the weekly payment regard must be had to a general reduction in wages since the date of the accident, but the point as to the right to a review upon a fluctuation in wages has never been decided. If there were such a right applications to review would be unlimited. The proviso to clause 16 permits an increase in the weekly payment based upon the amount which the workman would probably have been earning at the date of the review if he had remained uninjured ; but that is limited to the case of infant workmen.

Compston, K.C., and *Shakespeare*, for the respondents, were not called upon to argue.

SWINFEN EADY L.J. This is an appeal from a decision of Judge Bryn Roberts upon an application by the employers to review an award made under the Workmen's Compensation Acts, and the question raised is whether on such an application to review the arbitrator is entitled to take into account or to have regard to a change of circumstances resulting in an alteration in the rate of wages, and whether where the rate of wages which the injured

(1) [1910] 1 K. B. 683, 689. (2) [1910] 1 K. B. 694.
(3) [1912] 1 K. B. 63.

workman is able to earn has become altered there is such a circumstance, or such a change of circumstances, as enables either party to apply to review.

By the Workmen's Compensation Act, 1906, Sched. I., clause 16, it is provided that "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." It has been decided that there is no ground for making an application to review where there has been no change of circumstances, because, in substance, that application is not an application to review, but it is in effect, the circumstances remaining the same, an appeal from the previous decision. Where, however, there is a change of circumstances, both employer and workman have a right to apply to review.

In my opinion, what is contemplated by the statute is that the arbitrator shall be entitled to make from time to time such an award as, if the circumstances at the date when the previous award was made had been the same as at the time of the application to review, he would then have made—in other words, that an award has to be made from time to time in accordance with the circumstances as they exist at the date of such award; and if there was any matter that ought to have been taken into account when the award was originally considered such matter would also be proper to be taken into account at the time of the application to review. It is not disputed that where there has been a change in the amount, either increase or decrease, which the workman is earning after the accident that change gives a right to apply for a review; but counsel for the appellant limited the proposition by saying that if the amount which the injured man was able to earn had been increased or decreased by a circumstance not peculiar or special to himself, but owing to a general alteration in the rate of wages in the neighbourhood, that could not be taken into account.

In my opinion such a contention is quite unfounded. It must be remembered that according to clause 3 of the schedule a maximum amount is defined, and it is thereby provided that the weekly payment shall in no case exceed the difference between the average weekly earnings before the accident and the average weekly amount

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Swinfen Eady L.J.

which the party is earning, or is able to earn, in some suitable employment after the accident. That is the maximum amount. The first amount mentioned there is fixed. It is the average weekly earnings before the accident, and when once that has been ascertained it is ascertained for all time; it does not vary. The maximum is fixed by reference to two amounts, of which one is fixed and the other is, or may be, variable from time to time. The fixed amount is the average weekly earnings before the accident; the variable amount is the average weekly amount which he is earning, or is able to earn, in some suitable employment after the accident, and that may vary from time to time. It varies with his ability to get employment as well as with his personal ability and capacity; and the rate of wages and his ability to obtain employment will vary from time to time with the demand for labour in the market. It is the difference between those two amounts so arrived at that fixes the maximum allowance, but the compensation is not necessarily the maximum or any definite amount; it cannot, however, exceed the maximum. At the same time the statute requires that the weekly payment is to bear such relation to the amount of that difference—the difference between the two items I have mentioned—as under the circumstances of the case may appear proper. Therefore that difference will vary from time to time according to the varying circumstances. Wherever there is a change of circumstances, then it is open to either party to apply to review. Then upon an application to review the Court may end, diminish, or increase the amount of the compensation.

Now in this case Tarr, at the time of the accident, was earning 2*l.* 8*s.* 1*d.* per week, and he was afterwards able to obtain light work which brought him 1*l.* 6*s.* 1*d.*, so that the difference between his wages before and after the accident was 1*l.* 2*s.*, and half of that was 11*s.* He was paid 11*s.* for a considerable time.

The next thing that happened was that in or about the summer of 1915 Lord St. Aldwyn's award was made to take effect as from May, 1915. Under that award a war bonus of 3*s.* 2*d.* was given, and that brought the man's wages up from 1*l.* 6*s.* 1*d.* to 1*l.* 9*s.* 3*d.* Half the difference was 9*s.* 5*d.*, and he was paid 9*s.* 5*d.* for a time. Then his wages were further increased as from July, 1915, to 1*l.* 12*s.* 5*d.* That made the difference 15*s.* 8*d.* Then he was paid half, or 7*s.* 10*d.*

Then the next thing that took place was that the workman applied for a review; he was receiving 7*s.* 10*d.*, and he applied to the judge for a review, and the judge awarded him 9*s.*, having regard to his then wages, and on that footing he received 9*s.* compensation.

Then in the year 1916 there was a further advance in wages, and the man's wages were brought up to 1*l.* 15*s.* 5*d.* as compared with 2*l.* 8*s.* 1*d.* before the accident. That left a difference of 12*s.* 8*d.*, the half being 6*s.* 4*d.*, and on May 17, upon an application by the employers, the judge reviewed the award and reduced the 9*s.* a week compensation to 7*s.* 6*d.*—that is to say, half the difference being 6*s.* 4*d.*, the present rate of compensation was fixed at 7*s.* 6*d.*

In my opinion the judge was not only entitled but bound to take into consideration the fact that the man's wages had substantially increased since the previous award. The judge is bound to have regard to the amount which the man is earning, or is capable of earning, and the fact that this man's wages had increased in the same proportion as those of other colliers working in that and adjacent collieries seems to me to be irrelevant and immaterial. It is not a reason for disregarding the fact that this workman's wages have increased to say that other workmen's wages have also increased. That is altogether irrelevant.

With regard to the authorities, the matter was considered by the Court of Appeal in *Bevan* v. *Energlyn Colliery Co.* (1) at considerable length, and I am of opinion that upon the state of the authorities, although there are some dicta in one of the cases, there is no authority whatever for the proposition that such an important matter as an increase in the wages which an injured workman is able to earn and is earning should not be taken into account. In my opinion it must be taken into account, and where the alteration is substantial it is such a change of circumstances as entitles either party, the workman or the employer, to apply for a review.

I think that the judgment of the learned judge was right, and that the appeal fails.

BANKES L.J. I agree.

The first point taken in this case was that the learned county court judge had no jurisdiction to entertain the application to review.

(1) [1912] 1 K. B. 63.

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Now the application to review is made under clause 16 of Sched. I. to the Act, and it must be noticed that there is nothing in the clause itself which creates the necessity of establishing a change of circumstances as a condition precedent to an application to review. But the necessity for establishing a change of circumstances has been well established by the cases, and when they are looked into it will be seen that the decision was arrived at upon the ground that the power to apply for a review was not given for the purpose of enabling a person to appeal, but was merely inserted to enable a person to get a review which means, not an appeal, but a reconsideration of the matter upon fresh materials. That very plainly appears from the judgment of Romer L.J. in *Crossfield & Sons* v. *Tanian* (1), where he says: "The power given is a valuable one, and enables the amount of the weekly payment to be reviewed where a change in the circumstances has taken place since the award was made: that is the real object of the clause. Here, however, the facts are now as they were at the date of the award: no new fact has been brought forward by either party, and both sides when they came before the county court judge were bound to admit it. A decision in favour of the appellants would lead to great abuse; it would lead to this—that whenever a party was dissatisfied with the amount awarded he could in effect have a fresh arbitration as often as he liked until he got an award in his favour."

The matter was further considered in *Radcliffe* v. *Pacific Steam Navigation Co.* (2), and in that case Fletcher Moulton L.J. considered the matters which would and which would not create a state of things in which it was possible for a person resisting an application to review to establish that the question was res judicata. He deals with the matter in this way: "The issue on such a review is the same issue as if it were an original award made at the date of the review, and the amount to be awarded is a payment which in case of partial incapacity must not exceed the difference between the amount of the average weekly earnings of a workman before the accident and the average weekly amount which he is earning, or able to earn, in some suitable employment or business at the date of the review, but it is to bear such relation to the amount of such

(1) [1900] 2 Q. B. 629, 633. (2) [1910] 2 K. B. 685, 688, 690, 694.

difference as may under the circumstances of the case appear proper." He was down to that point quoting from Sched. I., clause 3. Then he goes on: "Now the average weekly earnings of the workman before the accident is a question of fact relating to a past date, and, therefore, if it has been litigated between the parties on any previous occasion (as, for instance, on the occasion of the original award) it may fairly be looked upon as res judicata and be treated as a matter that cannot be reopened. But the amount of wages which he is earning or able to earn in some suitable employment or business at the date of the review is ex necessitate rei a matter which has not been and could not have been litigated between the parties prior to the date of the review, and therefore cannot come under the head of res judicata. It is evident, therefore, that the amount to be awarded on review is not and cannot be res judicata since one of the necessary elements that must go to decide it is not res judicata." One of the necessary elements, as the Lord Justice points out, which must go to the decision is what the man is earning, or able to earn, in some suitable employment or business at the date of the application. It seems to me quite impossible to successfully contend that the learned county court judge is not entitled to take into consideration an alteration in the rate of wages which the man is actually receiving, or is able to earn—the difference between that amount and the amount which was brought before him and upon which he founded the previous award that he made in this case.

Under those circumstances it seems to me clear that the learned county court judge had jurisdiction. Great reliance was placed in argument on two statements, one by the Master of the Rolls and the other by Buckley L.J., in the case to which I have just referred. Those statements are obiter. The statement of the Master of the Rolls is carefully guarded, because he says: "Although I think it is competent to the county court judge to review an award similar to that which was made in June, it is right to add that any such application should be jealously scrutinized, and, further, that great care must be taken not to allow the fluctuations of the general labour market to justify a review." I am not sure whether by that he means to exclude the question of jurisdiction, but Buckley L.J.'s statement, as reported, is plainer and more distinct.

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He says: "The case now before the Court is one of the second class." (That was to say, where the question in dispute was whether the amount which the man was able to earn after the accident had been rightly fixed.) "The workman contended that his incapacity for the future by reason of the accident had been placed too low when it was fixed at 1*s.* a week. The contention was based not upon any alteration in the labour market (for fluctuations in the market ought not to be taken into consideration)." If that was meant to indicate that in the view of the learned Lord Justice the county court judge would have no jurisdiction to review a payment merely because a change in the market rate of wages was the ground relied upon as a change of circumstances, all I can say is that I do not agree with it; it seems to me to be in conflict with what was said by Fletcher Moulton L.J.

I only desire to add this in reference to the other part of Mr. Disturnal's argument, that under the last words of clause 3 it is quite plain that the county court judge has a wide discretion in fixing the relation which the amounts there referred to should bear to each other, and I quite agree that the fact that the change of circumstances which is brought to his attention as founding the application is one depending upon the alteration of the market rate of wages may be a matter which he should take into consideration as affecting his decision, although not a matter which should be taken into consideration as determining his jurisdiction. I agree that the appeal fails.

WARRINGTON L.J. I am of the same opinion.

It is well settled that in order to avoid an application for a review which would take the form merely of a rehearing of an application it is necessary that the applicant shall make out some change of circumstances justifying the review. Here the change alleged was an increase in the amount the man was earning, or able to earn, in some suitable employment. It is said that this is not a competent change of circumstances, because the increase is due not to some change in the physical condition of the man, or to some change in circumstances peculiarly affecting the man and his work, but that it is due to a general fluctuation in wages common to the trade.

In my opinion the change of circumstances which is alleged in

this case is a competent change of circumstances, and for this reason. The weekly payment which it is sought to review was fixed in accordance with clause 3 of Sched. I. Under that clause the weekly payment is to bear such relation to the amount of the difference between the earnings before the accident and the weekly amount which the man is earning, or is able to earn, after the accident as, under the circumstances of the case, may seem proper.

Now in the present case the difference (it is referred to in the Act as "the difference") has changed in amount. The weekly payment, therefore, cannot bear the same relation to that difference as it bore to the difference which had to be taken into account when the original weekly payment was fixed. It seems to me that, under those circumstances, if the function of the county court judge is to fix at the date of the review such weekly payment as would be the right sum if he were then making an original award he must have jurisdiction if the relation between the weekly payment and the difference between the two average amounts of earnings has been altered.

Solicitors for appellant: *Smith, Rundell & Dodds, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

G. A. S.

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[IN THE COURT OF APPEAL.]

H. O. BRANDT & CO. *v.* H. N. MORRIS & CO., LIMITED.

[1916 B. 1074.]

Principal and Agent—Sale of Goods—Contract made during War—Heading "for and on behalf of" a Foreign Principal—Signature by Agent without Qualification—Right of Agent to sue on Contract—F.o.b. Contract—Prohibition against Export—Licence to export—On whom Duty to apply for Licence lies.

The plaintiffs, who carried on business in Manchester, gave to the defendants, who were chemical manufacturers in Manchester, a bought note, dated September 3, 1914, which was addressed to the defendants and was headed "From Messrs. H. O. Brandt & Co., 63 Granby Row, Manchester. For and on behalf of Messrs. Sayles Bleacheries, Saylesville, Rhode Island, U.S.A." The note stated "We have this day bought from you 60 tons pure aniline oil," and it was signed "H. O. Brandt & Co." There was evidence that during war time the destination of goods intended for export must be made known. The plaintiffs having sued for non-delivery of the oil:—

Held, by Viscount Reading C.J. and Scrutton L.J., Neville J. dissenting, that the plaintiffs were contracting parties and were entitled to sue upon the contract.

The contract was for monthly deliveries over five months "f.o.b. Manchester." After the contract was made the export of aniline oil was prohibited by an Order of Council, and this prohibition was in existence during the greater part of the five months, but licences to export were being granted in certain cases:—

Held, that the obligation of applying for a licence lay upon the buyers and not upon the sellers.

APPEAL from the judgment of Lawrence J. at the trial without a jury of an action to recover damages for breach of contract in not delivering a quantity of aniline oil.

The plaintiffs were merchants and shippers carrying on business at Manchester. The defendants were chemical manufacturers at Manchester. On September 3, 1914, by bought and sold notes signed respectively by the plaintiffs and the defendants, a contract was entered into, the bought note being as follows:—

"To H. N. Morris & Co. Limited,
Gorton Brook Chemical Works,
Manchester, S.E., 3rd September, 1914.

"From
"Messrs. H. O. Brandt & Co.,
63 Granby Row, Manchester.
"For and on behalf of:—Messrs. Sayles Bleacheries,
Saylesville, Rhode Island, U.S.A.

"We have this day bought from you 60 tons pure aniline oil.

"Time of delivery:—

30 tons September, 1914.
15 ,, October, 1914.
5 ,, November, 1914.
5 ,, December, 1914.
5 ,, January, 1915.

} It is understood that you will deliver part of this in October, if possible.

"Mode of delivery.—F.O.B. Manchester. In usual 100 gallon drums charged at 30*s.* each for plain iron drums or 40*s.* for galvanised drums. You understand we prefer plain iron drums.

"Price:—

30 tons September at 6*d.* per lb.
15 ,, October at 6*d.* ,,
15 ,, November at 7*d.* ,,
15 ,, December at 7*d.* ,,
15 ,, January at 7*d.* ,,

"Packages.—In iron drums as above.

"Terms of payment.—Cash:—Nett cash against documents less 1½ % commission (or before delivery if required).

"CONDITIONS OF SALE.

"1. Deliveries may be suspended pending any contingencies beyond the control of the sellers (such as strike, lock-out, fire, accidents, war, or the like) causing a short supply of fuel or raw material or otherwise preventing the manufacture or delivery of the article.

"2. Any deliveries so suspended may be claimed by the buyer at the same rate of delivery, commencing after the period assigned to this contract, if such claim be made within a month after such suspension. Any deliveries not so claimed are cancelled.

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"3. Each delivery shall be considered a separate contract, and the failure of any delivery shall not vitiate the contract as to others.

. . . . . .

"6. Any disputes on the contract to be settled by arbitration in the usual manner, and the arbitrators to have power to determine by whom the cost of the reference and award shall be borne, and this agreement may be made a rule of the High Court of Justice. . . . .

"H. O. Brandt & Co."

The sold note was in similar terms.

By an Order of the Privy Council dated September 8, 1914, and made under s. 8 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), as amended by the Customs (Exportation Prohibition) Act, 1914 (4 & 5 Geo. 5, c. 64), "coal tar products for use in dye manufacture" (which includes aniline oil) were added to the list of articles prohibited to be exported from the United Kingdom by former Proclamations.

Twenty tons were shipped during September, apparently without a licence (1), leaving ten tons not delivered.

By an Order of the Privy Council, dated September 25, 1914, aniline oil and aniline salt were excepted from the prohibition in the Order of Council of September 8 of the export of coal tar products for use in dye manufacture.

In October five tons and in November five tons were delivered. On December 11 the prohibition was renewed and still remained in existence.

No deliveries were made in December, 1914, or January, 1915. It is unnecessary to set out the facts. It is sufficient to state that it appeared from the correspondence that during the time the prohibition was in force the plaintiffs left it to the defendants to apply for a licence to export. The defendants accordingly applied in September to the Board of Trade for a licence, which was refused, but upon an application in December a licence was granted for a shipment in January, 1915, but the licence arrived too late for ship-

(1) This seems to have been done owing to some uncertainty in the matter, as the shipment took place immediately after the Order was made.

ment during that month. The evidence also showed that in time of war the name and address of the person to whom goods intended for export were to be sent must be stated.

The plaintiffs claimed damages for non-delivery of the balance of the 60 tons of aniline oil. The defendants contended that the plaintiffs were not entitled to sue upon the contract; that during the time when the prohibition against export was in existence they were "prevented" from making deliveries within the meaning of condition 1 of the contract; and that, as to the period from September 25 to December 11, the prohibition was removed upon an undertaking given by them and the only two other manufacturers of aniline oil in this country to supply the home demand first before exporting any oil, that after supplying the home demand there was no oil or hardly any left for export, and that this amounted to a "prevention."

Lawrence J. held that the plaintiffs were parties to the contract and were entitled to sue upon it; that during September, notwithstanding the prohibition, the defendants had in fact exported 20 tons of aniline oil; that as to the period from September 25 to December 11, during which there was no prohibition, the undertaking to the Board of Trade did not amount to a prevention; that in respect of the period after December 11 the defendants, who had taken upon themselves the obligation of obtaining a licence, did not make sufficient applications for a licence; and that therefore the defendants had no defence to the action. With regard to the damages, inasmuch as the plaintiffs consented, upon the defendants' statement to the effect that they hoped to deliver later, to extend the time for delivery, he assessed the damages upon the authority of *Ogle* v. *Earl Vane* (1) as at March, 1916, at 3118*l.*

The defendants appealed.

Cyril Atkinson, K.C., and *J. D. Crawford*, for the defendants. The plaintiffs are not entitled to sue upon the contract. The contract shows on its face that the plaintiffs were acting as agents for Messrs. Sayles Bleacheries, who were the parties to the contract. The words "for and on behalf of Messrs. Sayles Bleacheries" show that the contract is made by the plaintiffs as agents only. In *Gadd* v.

(1) (1867) L. R. 2 Q. B. 275; (1868) L. R. 3 Q. B. 272.

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Houghton (1) the contract note stated "We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges," and the defendants signed without qualification. It was held by this Court that the defendants were not personally liable on the contract. There is no difference between "for and on behalf of" and "on account of." In that case James L.J. said that the decision in *Paice* v. *Walker* (2)—where the words in the body of the contract were "as agents for," and the defendants signed without qualification—that the words were merely words of description and that the defendants were personally liable on the contract, could not be upheld. In *Ogden* v. *Hall* (3) the words "on behalf of" were in the body of the contract, and the defendant was held not to be personally liable though he signed without qualification. In *Miller, Gibb & Co.* v. *Smith & Tyrer, Ld.* (4), *Gadd* v. *Houghton* (1) was referred to with approval. The mere fact that the words "for and on behalf of Messrs. Sayles Bleacheries" are in the heading of the contract note and not in the body cannot make any difference. They are not words of description. It is said that those words were put there merely for the purpose of showing the destination of the goods, as required during war time. But they are not apt words for that purpose. The statement that the goods are purchased for and on behalf of a person in the United States does not show that the goods are to be shipped there. Further, the statement that the plaintiffs were to be paid commission shows that they were contracting as agents.

[SCRUTTON L.J. referred to *Cooke* v. *Wilson* (5), and also to *Hough & Co.* v. *Manzanos & Co.* (6), where Pollock B. followed *Paice* v. *Walker*. (2)]

Next, if the plaintiffs are entitled to sue, the defendants have not committed any breach of contract. They were "prevented" from delivering the aniline oil by a contingency beyond their control within condition 1 of the contract, and the deliveries were therefore and still are suspended: *Andrew Millar & Co.* v. *Taylor & Co.* (7) By the Order of Council of September 8, 1914, the

(1) (1876) 1 Ex. D. 357.
(2) (1870) L. R. 5 Ex. 173.
(3) (1879) 40 L. T. 751.
(4) Ante, pp. 141, 151, 160.
(5) (1856) 1 C. B. (N.S.) 153.
(6) (1879) 4 Ex. D. 104.
(7) [1916] 1. K. B. 402, 410, 411.

defendants were prohibited from exporting aniline oil, and a licence would be necessary for exporting it. This prohibition was removed on September 25 upon the defendants and the two other firms which manufactured aniline oil in this country giving their undertaking to supply the home trade first. The evidence shows that after supplying the requirements of the home trade the defendants had very little aniline oil left for export. This continued until December 11, when the prohibition was renewed, and it still continues. There has therefore been a suspension of delivery, and the plaintiffs' right is to claim delivery, under condition 2, within one month after the suspension has expired.

The defendants, though they voluntarily applied to the Board of Trade for a licence to export, were under no duty to do so. The duty was on the plaintiffs as the buyers to apply for a licence. They were the only persons who could satisfy the authorities as to the destination of the oil. The contract was f.o.b. Manchester, and the buyers had to provide the ship and the space for the goods, the sellers' only duty being to put the goods on board the ship. Sect. 8 of the Customs and Inland Revenue Act, 1879, as extended by s. 1 of the Customs (Exportation Prohibition) Act, 1914 (see also Trading with the Enemy and Export of Prohibited Goods Act, 1916 (6 & 7 Geo. 5, c. 52), s. 3), prohibited the oil from being brought on to the quay to be shipped for exportation, there being no licence to export it. The sellers under the contract were only bound to do what was legal, and it was the duty of the buyers to apply for the licence so as to make it legal to put the oil on board the ship for export. It is not necessary, in order to give to the transaction such business efficacy as the parties must have intended it should have, to imply a term that the sellers shall obtain or use reasonable endeavours to obtain a licence: *The Moorcock* (1); *Lazarus* v. *Cairn Line.* (2) The prohibition against export having supervened after the making of the contract, the parties could not have contemplated at the time of making the contract that a licence would be necessary. The defendants voluntarily applied for the licence, but in the absence of a contract to do so founded on good consideration that imposed no liability upon them. Even if there was a duty on the defendants to apply for a licence, they performed that

(1) (1889) 14 P. D. 64, 68. (2) (1912) 17 Com. Cas. 107, 113.

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duty by taking all reasonable steps to obtain a licence. [*Esposito* v. *Bowden* (1) was also referred to.]

If, however, the defendants are liable for breach of contract, by condition 3 each delivery is to be deemed a separate contract, and the damages ought to be assessed at the end of any month in which there was a breach; or at latest on January 31, 1915. There was no evidence of any request by the defendants to the plaintiffs to forbear to sue for the breach and of a voluntary forbearance by the plaintiffs so as to postpone the date on which the damages are to be assessed within the rule laid down in *Ogle* v. *Earl Vane*. (2)

Langdon, K.C., and *Acton*, for the plaintiffs. The words "for and on behalf of Messrs. Sayles Bleacheries, Saylesville, Rhode Island, U.S.A.," at the head of the contract note are words of description and not of obligation; and the words are put on the contract for Customs clearance purposes to show the name of the person for whom the goods are shipped and their destination, so as to prevent trading with the enemy. The contract was made during the war, and the destination of the goods and the name of the consignee must be stated in the contract. Those are relevant circumstances to be taken into consideration. In *Gadd* v. *Houghton* (3) the contract was made by fruit brokers and they sold "on account of" their principals. That was clearly a contract by them as agents. Each contract depends upon its own language. The contract in the present case comes within the principle of the decision in *Paice* v. *Walker*. (4) If the language of the contract is at all doubtful, the Court in construing the contract will have regard to the presumption that the foreign principal is not bound: *Armstrong* v. *Stokes* (5); *Elbinger Actien-Gesellschaft* v. *Claye* (6); *Miller, Gibb & Co.* v. *Smith & Tyrer, Ld.* (7) The defendants must then show that the foreign principal is bound by the contract and that therefore the plaintiffs cannot sue upon it, and this they have not proved. In *Miller, Gibb & Co.'s Case* (7) the foreign principal was admittedly bound by the contract. The plaintiffs can therefore sue.

(1) (1857) 7 E. & B. 763.
(2) L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.
(3) 1 Ex. D. 357.
(4) L. R. 5 Ex. 173.
(5) (1872) L. R. 7 Q. B. 598, 605.
(6) (1873) L. R. 8 Q. B. 313, 317.
(7) Ante, pp. 149, 150.

Next, the defendants were not "prevented" during the whole time from making deliveries by a contingency beyond their control. They were clearly not prevented from making the October-November deliveries. Even if they were prevented, under condition 1 the defendants never exercised the option under condition 1 of suspending deliveries by giving notice of their intention so as to enable the plaintiffs to claim delivery under condition 2.

With regard to the question as to the obligation to apply for a licence, the contract being an f.o.b. contract the sellers had to ship the goods. They had to take all reasonable steps to get the goods on board the ship, and as the oil could not have been shipped without a licence they had to take all reasonable steps to obtain a licence: *In re Anglo-Russian Merchant Traders, Ld. and John Batt & Co.* (1) The goods under a f.o.b. contract might have been intended for shipment on a vessel sailing coastwise, when no licence would be required. Further, upon the evidence it is clear that the defendants undertook the duty of applying for a licence, and relieved the plaintiffs of the duty, if the duty was on them. It would be unjust to allow them now to turn round and seek to impose that duty on the plaintiffs. It is similar to a waiver of a condition precedent by a party to a contract in whose favour it is imposed: Benjamin on Sale, 5th ed., p. 563, citing *Bentsen* v. *Taylor, Sons & Co.* (2)

As to the damages, the learned judge was right in drawing the inference that the plaintiffs at the request of the defendants voluntarily abstained from suing for the breach of contract so as to give the defendants an opportunity of making the deliveries, and this continued down to March 21, 1916, when the defendants definitely stated that they were unable to deliver any aniline oil. The damages were therefore properly assessed as on that date: *Ogle* v. *Earl Vane.* (3)

Cyril Atkinson, K.C., in reply. In *In re Anglo-Russian Merchant Traders, Ld. and John Batt & Co.* (1) the contract was a c. and f. contract, made with knowledge of an existing prohibition against export, and the sellers had to do everything that was reasonably necessary to obtain a licence for shipment to Vladivostok. As to the defendants having undertaken to apply for a licence, this was done

(1) Ante, p. 679.
(2) [1893] 2 Q. B. 274.
(3) L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.

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voluntarily. To make the defendants liable there must be a representation of an existing fact, and not of intention, which the defendants are estopped from denying, or there must be a contract founded on good consideration: *Rainford* v. *James Keith & Blackman Co.* (1)

VISCOUNT READING C.J. The plaintiffs sue for damages for breach of contract in not delivering the balance of a contract quantity of 60 tons of aniline oil. At the trial before Lawrence J. judgment was entered for the plaintiffs for 3118*l*. The defendants ask for judgment on three grounds: (1.) that the plaintiffs are not the contracting parties and therefore cannot maintain this action; (2.) that there has been no breach of contract because the prohibition of the export of aniline oil has had the effect of suspending the operation of the contract; and (3.) that, if there was a breach, the damages were assessed at the wrong period.

The defendants are manufacturers of aniline oil. It seems that they and two other firms are the only manufacturers of aniline oil in this country. Before the war Germany was supplying many of the requirements of British consumers and others, and when the war broke out there was an increased demand for aniline oil manufactured in this country both from British consumers and from the United States.

The first point is, Who are the contracting parties? It is said that the plaintiffs are the declared agents under the contract for Messrs. Sayles Bleacheries, of the United States, who became the purchasers of the oil and the contracting parties with the defendants. If that contention were right, this action would fail. The question seems to me to be by no means free from difficulty, but I have come to the conclusion that this ground of appeal fails. We are entitled to look at the surrounding circumstances. The contract was made after war had broken out and at a time when, according to the evidence, it was required of a contracting party to state the destination of the goods. The contract (taking the bought note) contains at the head of it "To H. N. Morris & Co. Limited, Gorton Brook Chemical Works, Manchester, S.E. 3rd September, 1914. From Messrs. H. O. Brandt & Co., 63 Granby

(1) [1905] 1 Ch. 296, 302.

Row, Manchester. For and on behalf of Messrs. Sayles Bleacheries, Saylesville, Rhode Island, U.S.A." In the body of the document there are these words: "We have this day bought from you 60 tons pure aniline oil"; and the document is signed "H. O. Brandt & Co." The sold note is in the same form mutatis mutandis. The contention is that the plaintiffs must be regarded as if they had signed the contract for and on behalf of Messrs. Sayles Bleacheries, of the United States, and reliance was placed upon the decision of this Court in *Gadd* v. *Houghton*. (1) In that case the sold note stated "We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges"; and the note was signed by the defendants without any qualification. It was held that the words "on account of James Morand & Co." showed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract. In the present case the document is different, as the body of the document does not contain the words "on behalf of Messrs. Sayles Bleacheries." It does not necessarily follow from that that the document cannot be read as if Brandt & Co. were contracting for and on behalf of Messrs. Sayles Bleacheries, but we must have regard to the principle of law stated by Mellish L.J. in *Gadd* v. *Houghton* (2): "The language used must be interpreted according to its plain and natural meaning. As is said in the note to *Thomson* v. *Davenport* (3), when a man signs a contract in his own name he is prima facie a contracting party and liable, and there must be something very strong on the face of the instrument to shew that the liability does not attach to him. But if there are plain words to show that he is contracting on behalf of somebody else, why are we not to give effect to them?" I base my decision upon the language used by Mellish L.J. Prima facie when a man signs a document in his own name, and states therein "I have this day bought from you," he is the person liable on the contract. If he is in fact making the contract on behalf of a foreign principal, and that is known to the other contracting party, it is an element to be taken into consideration, but nothing more than that, in determining whether or not the person signing intended to bind himself

(1) 1 Ex. D. 357. (2) 1 Ex. D. 360.
(3) 2 Sm. L. C., 12th ed., 379.

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or his foreign principal. I come to the conclusion that the words at the head of the contract note, "For and on behalf of Messrs. Sayles Bleacheries, Saylesville, Rhode Island, U.S.A.," are to be treated as a declaration of the destination of the goods. It is said that the words are not apt to describe the destination, but I am not convinced by that. The person to whom and the country to which the goods were destined had to be shown, and that is a circumstance which I am entitled to take into account; and in my opinion the statement at the head of the note that the plaintiffs are acting "for and on behalf of" a foreign principal does not get rid of the prima facie presumption that a person signing a contract in his own name is personally liable on it. There is not sufficient to show that the foreign principal is the contracting party. The first point therefore fails.

With regard to the other points, on September 8 an Order of Council was made under s. 8 of the Customs and Inland Revenue Act, 1879, as extended by the Customs (Exportation Prohibition) Act, 1914, prohibiting the export of aniline oil. The prohibition lasted until September 25. During that month the plaintiffs delivered 20 tons out of the contract quantity of 30 tons. This lot was shipped and exported, apparently without a licence, which probably arose owing to some uncertainty, as the shipment was made immediately after the Order was issued. As to the remaining 10 tons, which were not delivered, it is admitted that the defendants were "prevented" from delivering them. It is said, however, that the defendants must give notice of suspension of deliveries on the ground of prevention, that no such notice was given, and that therefore, notwithstanding the admission, the defendants had not made out any defence as regards those 10 tons. In my opinion the plaintiffs cannot recover in respect of those 10 tons. They had a right under conditions 1 and 2 to claim that deliveries should be made as therein mentioned notwithstanding the suspension. The prohibition against export had been issued, and it was known to both sellers and buyers. No claim had been made by the buyers which was necessary in order to entitle them to have delivery after the date assigned. Therefore the claim as to the 10 tons fails.

With regard to the October and November instalments there was

a short delivery of about 10 tons. The prohibition was not operative during those months. The defence is that the prohibition was withdrawn upon an undertaking by the defendants and the two other manufacturers of aniline oil to supply the home demand before exporting any oil; that the defendants had no oil left after supplying the home trade; and that that is the same as if they were prevented by war from making deliveries during those two months. In my opinion this defence fails upon the facts. No doubt the defendants informed the Board of Trade that they would not ship abroad until they had supplied the home market. There is, however, no evidence to show that the prohibition was withdrawn in consideration of any such undertaking. There was no agreement to that effect. Therefore the defence as to October and November deliveries fails.

As regards the December and January deliveries, the learned judge held that there was a duty on the defendants to use their best endeavours to obtain a licence to export the oil, and he was not satisfied that they had done so; and that, even if the duty was not imposed on them by the contract, they had taken upon themselves the duty. I am unable to agree with the learned judge that the duty of applying for the licence was upon the defendants. They had contracted to sell f.o.b. They had therefore contracted to put the oil on board a vessel selected, not by them, but by the plaintiffs. It was the duty of the plaintiffs to find the ship, and the facts which it was necessary to state when a licence had to be applied for were known to them and not to the defendants. All that the sellers know in such a case is that they have sold the goods to their buyers. I have therefore come to the conclusion that there was no such duty on the defendants as the learned judge has found, and the result is that the defendants have not committed a breach of the contract in not delivering in December and January.

The only default, therefore, is in the non-delivery of the 10 tons in October and November. The time for assessing the damages would ordinarily be at the date fixed for each monthly delivery. There is, however, sufficient in the correspondence to warrant the inference which the learned judge has drawn that the defendants after they were in default were requesting the plaintiffs to allow them further time to make delivery, and the plaintiffs granted that

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request. That being so, it is not open to the defendants now to say that the damages ought to be assessed at the end of October and November, 1914, respectively. I cannot, however, accept the date of March, 1916, which the learned judge took as the date for assessing the damages. Upon the evidence I think that the requests by the defendants for time for making delivery were continued down to July, 1915, but from that date they made it clear that they could not make any deliveries.

The appeal must be allowed and the damages reduced accordingly.

SCRUTTON L.J. This is a class of case which I always approach with considerable apprehension. It is a case of a complicated instalment contract which has not worked out as the parties intended it should. Such a case can only be determined by taking each date for delivery, and carefully considering the effect at each point of time of the principles of law which have been laid down as applicable to such cases.

The first point which has been raised, if correct, would dispose of the case. The defendants say that the action should have been brought by Messrs. Sayles Bleacheries. The contract states: "We have this day bought from you 60 tons pure aniline oil," and is signed "H. O. Brandt & Co." There is a heading "From Messrs. H. O. Brandt & Co. . . . . for and on behalf of Messrs. Sayles Bleacheries, Saylesville, Rhode Island, U.S.A." The cases in which the question as to the personal liability of an agent on a contract has been discussed are numerous, but there is one cardinal principle, which was stated more than sixty years ago, to be borne in mind in approaching such cases. In *Cooke* v. *Wilson* (1) Cresswell J. said: "Prima facie, when a man signs a contract in his own name, he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability from attaching to him." Crowder J. said (2): "I have always understood the law to be, that, if a man signs a written contract, he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only." Later, in *Gadd* v. *Houghton* (3), which may perhaps be called the leading case, Mellish L.J. states

(1) 1 C. B. (N.S.) 153, 162. (2) 1 C. B. (N.S.) 164.
(3) 1 Ex. D. 357, 360.

the same principle: "As is said in the note to *Thomson* v. *Davenport* (1), when a man signs a contract in his own name he is prima facie a contracting party and liable, and there must be something very strong on the face of the instrument to shew that the liability does not attach to him." When I find in this contract the words "We have this day bought from you," and the signature "H. O. Brandt & Co.," in my view something very strong is needed to show that Brandt & Co. have not contracted personally. In *Gadd* v. *Houghton* (2) immediately following the words "We have this day sold to you" in the body of the document there were the words "on account of James Morand & Co., Valencia"; and the Court of Appeal held that in a contract worded in that form there was sufficient to show that the person who signed in his own name was not making himself personally liable. In the present case there is no such statement or qualification in the body of the document. In my opinion the fact that there is this heading to the effective part of the document is not sufficient to displace the strong prima facie presumption that a person who says he has bought and signs his own name to the document without qualification is contracting personally.

In arriving at this conclusion I am aided by two facts. In the first place it is necessary in time of war to make known the destination of the goods, and the statement on the face of the document that the aniline oil was destined for Messrs. Sayles Bleacheries, Saylesville, Rhode Island, U.S.A., is material to the transaction being carried out. That explains why "for and on behalf of" a person in America should be put upon the contract. The other fact which I take into account is that Messrs. Sayles Bleacheries are foreigners, and while I think that one cannot at the present day attach the importance which used to be attached forty or fifty years ago to the fact that the supposed principal is a foreigner, it is still a matter to be taken into account in deciding whether the person said to be an English agent has or has not made himself personally liable.

For these reasons I have come to the conclusion that there is nothing in this contract to displace the strong prima facie presumption that a man who signs in his own name a statement that he has

(1) 2 Sm. L. C., 12th ed., 379. (2) 1 Ex. D. 357.

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bought contracts personally, and therefore can sue on the contract. This point accordingly fails.

The next point is this: This is a contract to sell 60 tons of aniline oil f.o.b. Manchester. At the date of the contract there was no prohibition against the export of aniline oil. In *In re Anglo-Russian Merchant Traders, Ld. and John Batt & Co.* (1) the contract was a c. and f. contract, and at the date thereof there was an existing prohibition against export except under a licence. A question arose as to whose duty it was to obtain a licence. Bailhache J. held that the person who had contracted to sell undertook to obtain the licence or to pay damages. This Court held that, as there was a finding of fact that the seller had done all in his power to get a licence, at any rate his obligation was not higher than that, and that therefore he was not liable. In this case it becomes necessary to go further and to decide whether in this f.o.b. contract the obligation to obtain a licence, in case there should after the making of the contract be a prohibition against export, lies upon the sellers or the buyers. In my opinion it lies upon the buyers. The buyers must provide an effective ship, that is to say, a ship which can legally carry the goods. When the buyers have done that the sellers have to put the goods on board the ship. If that is so, the obtaining of a licence to export is the buyers' concern. It is their concern to have the ship sent out of the country after the goods have been put on board, and the fact that under s. 8 of the Customs and Inland Revenue Act, 1879, as amended by s. 1 of the Customs (Exportation Prohibition) Act, 1914, a prohibition against export includes a prohibition against bringing the goods on to any quay or other place to be shipped for exportation does not cast the duty of obtaining the licence on the sellers. Bringing the goods on to the quay is merely subsidiary to the export which is the gist of the licence. In my view, therefore, in a contract of this kind it is for the buyer to get the licence. It is further said that, if the duty prima facie was on the buyers to get the licence, in this case the correspondence shows that the sellers took upon themselves the burden of getting it. Having carefully considered the correspondence I have come to the conclusion that there is nothing in it from which I can say that legally any such burden is placed on the sellers.

(1) Ante, p. 679.

Coming now to the particular months, in September there was a prohibition in form absolute against the export of aniline oil for seventeen days, during which in some way which has not been explained, but which probably was due to the general conditions in the early part of the war, 20 tons were shipped without a licence notwithstanding the prohibition. Counsel admitted that as to the remaining 10 tons the sellers were prevented from delivering. That admission relieves me from the necessity of considering the somewhat difficult question of what is the position of a person who has a month in which to do something and who is prevented from doing it for a part of that time. No claim was made by the buyers within the time mentioned in condition 2 of the contract for carrying on the suspended deliveries. Nor did the sellers claim or obtain the assent of the buyers to delivering those 10 tons at another time. The sellers therefore proved a prevention which excused their non-delivery of the 10 tons, in September, and neither party proved anything which extended the obligation to deliver. The shortage for September therefore drops out of the case.

I come next to the October-November period when there was no prohibition, a state of matters which lasted down to December 11. The sellers say that they were prevented from making delivery for this reason: that the prohibition was only withdrawn upon their making a bargain to supply the home market first, and that after supplying the home market there was only a very small surplus left to deliver to the buyers. In my view the sellers have failed to prove this contention. There was, in my view, no more than a working arrangement that the sellers would supply the home market first, but there was nothing which prohibited them from fulfilling contracts. The result is that as regards the months of October and November taken together there was a shortage. Then arises the question whether the time for delivering the goods which were short delivered in those months has been extended. This brings me to the case of *Ogle* v. *Earl Vane*. (1) In that case the jury found that the seller's agent had held out to the buyer that he would be able to deliver the iron and that the buyer had assented to that and waited accordingly. In those circumstances the damages were measured at the date when the buyer got tired

(1) L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.

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of waiting and refused to wait any longer. The Court thought that there was evidence in the letters in that case upon which the jury might come to the conclusion they did. There is exactly the same class of letters in this case, and Lawrence J. has found that there was an extension of time as in *Ogle* v. *Earl Vane* (1), and I do not feel able to interfere with the finding of the learned judge on this point. I think, however, that he carried the extension of time too far. He took it up to March, 1916. Looking at the letters, I do not think the extension can be taken further than July, 1915.

Lastly, there remain the December and January shipments. During nearly the whole of that period there was an absolute prohibition against export, but licences were being granted, although the Order made no provision therefor. The learned judge has found that the defendants did not make sufficient application for a licence, and if this were material I should not have felt able to disagree with his finding of fact, as he saw the witnesses. But, as I have already said, it was not the duty of the sellers to get the licence, and as there is nothing in the correspondence placing that duty on them, the finding of the learned judge on this point is immaterial. There was therefore a prevention by prohibition, which, so far as I can see, has not yet come to an end, and the buyers have not obtained any licence. The shortage for December and January accordingly falls out of the case. The result is that the plaintiffs' claim is limited to the October and November deliveries.

NEVILLE J. I have the misfortune to differ from the other members of the Court upon one point, namely, whether the plaintiffs are entitled to sue on the contract. I agree that when a man signs a document in his own name he is prima facie liable. It is conceded, however, as I understand, that if the words " for and on behalf of Messrs. Sayles Bleacheries " had followed the signature the contract would not have been with the plaintiffs as principals. I understand *Gadd* v. *Houghton* (2) to have decided that the statement of the character in which a person is contracting may with equal efficacy be expressed in words to be found in the body of the document as in words attached to the signature. The words in the present case, in my opinion,

(1) L. R. 2 Q. B. 275 ; L. R. 3 Q. B. 272.
(2) 1 Ex. D. 357.

form part of the contract. If they form part of the contract, then they are, in my opinion, to be found in the body of the contract in the sense in which those words are used in *Gadd* v. *Houghton*. (1) In my opinion no distinction in this respect can be made between the case of a home and a foreign principal. In *Gadd* v. *Houghton* (1) the principal was a foreign principal. I rather gather that I should not have found myself in isolation on this point were it not for the fact that during the war there is an obligation to disclose the destination of the goods. With regard to that, though I agree that evidence of the fact is admissible as one of the surrounding circumstances in which the contract was made, there seems to me to be nothing in it which entitles me to read plain words in other than their plain meaning. The words used here are perfectly plain. It may well be that they serve a double purpose, both to give the required information and to show the character in which one of the parties is contracting. That, however, does not justify me in depriving the words of the plain meaning which, to my mind, they undoubtedly bear.

Before I leave the case I wish to express my surprise at finding in the books such a subtle discrimination attributed to the commercial mind as to draw distinctions between the words "as agents for," "on account of," and "on behalf of." To my mind each of these phrases bears precisely the same meaning. With regard to the note in Benjamin on Sale, 5th ed., p. 257, in which it is said that after the dictum of James L.J. in *Gadd* v. *Houghton* (2) *Paice* v. *Walker* (3) must be looked upon as of very doubtful authority, I wish to express my opinion that in view of *Gadd* v. *Houghton* (1) it is of no authority at all.

As regards the rest of the case I agree with the other members of the Court, and have nothing to add.

Appeal allowed; judgment varied.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Boote, Edgar, Grace, & Rylands, Manchester.*

Solicitors for defendants: *Grundy, Kershaw, Samson & Co.*

(1) 1 Ex. D. 357. (2) 1 Ex. D. 359.
(3) L. R. 5 Ex. 173.

1917
July 25.

THE KING *v.* JUSTICES OF DERBY.

Highway—Diversion Order—Notices specifying Date of intended Application to Quarter Sessions—Subsequent Alteration of Date of holding Sessions—Validity of Notices—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 85; *Schedule, Form* 19.

Although the form of notice of intended application to quarter sessions for the diversion of a highway under s. 85 of the Highway Act, 1835 (Form 19 of the schedule to that Act), contains a blank for the insertion of the date on which the application is proposed to be made, it is not necessary to state the date in the notice; it is enough that the notice makes it clear that the application will be made to the quarter sessions held next after the expiration of four weeks from the day on which the justices' certificate is lodged with the clerk of the peace.

A certificate of justices for the diversion of a highway was lodged with the clerk of the peace on May 21. In the notice of intended application to the quarter sessions it was stated that the application would be made on July 4, that being the date on which the summer sessions would in the ordinary course be held. Subsequently, the county assizes having been fixed for July 3, it became necessary to alter the date of holding the quarter sessions. The justices accordingly altered it to June 20, and on that day the application for enrolment of the certificate was made. The four weeks from the lodging of the certificate with the clerk of the peace expired on June 18:—

Held that, notwithstanding the alteration of the date, the notice was a good notice, and the quarter sessions had jurisdiction to entertain the application.

Rule for a mandamus to the justices of the county of Derby to hear an application under the Highway Act, 1835, for an order to divert a highway.

Francis Sumner & Co., of Wren Nest Mills, in the borough of Glossop, being desirous of diverting a certain highway in the borough, applied to the corporation of Glossop as the surveyor of highways of the district, who on April 23, 1917, obtained a certificate of justices under s. 85 of the Highway Act, 1835. By that section the justices, if they grant a certificate, are to direct the surveyor to affix "a notice in the form or to the effect of schedule (No. 19) to this Act" at the ends of the portion of the road to be diverted, and also to insert a similar notice in a local newspaper. Form 19

of the schedule is as follows: "Notice is hereby given that on the day of next application will be made to His Majesty's justices of the peace assembled at quarter sessions . . . . for an order," &c. As it was desired to make the application to quarter sessions for the enrolment of the certificate at the summer sessions, the corporation, immediately on the certificate being issued, affixed and inserted the required notice, filling up the blank for the date as July 4, that being the date on which the summer sessions would in the ordinary course be held. The assizes for the county of Derby having been fixed for July 3, it became necessary for the justices to alter the date of holding the quarter sessions, and they accordingly, under the powers conferred upon them by the Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 3, altered the date to June 20. Under s. 85 the certificate of the justices is to be lodged with the clerk of the peace for the county, and the application for its enrolment is to be made "at the quarter sessions which shall be holden . . . . next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged." The justices' certificate had been lodged with the clerk of the peace on May 21, and the four weeks from that date expired on June 18. On the application for enrolment of the certificate being made to the quarter sessions on June 20 the justices declined jurisdiction on the ground that a wrong date, namely July 4, had been specified in the notices. The notices and proceedings were in other respects in order. A rule having been obtained as above mentioned,

Maddocks, for the justices, showed cause. Sect. 85 of the Highway Act, by way of safeguarding the interests of the public against any improper diversion or closing of a highway, requires that ample notice should be given both by placards affixed in the road affected and by notice in the public press of the intended application to quarter sessions for an order for the diversion or closing as the case may be. The object of that notice is to allow members of the public to exercise the right of appeal to quarter sessions against the justices' certificate which is given them by s. 88; and it is for that reason that the statutory form of notice (Form 19) contains a blank for the date on which the application for enrolment of the certificate will be made, so that the intending appellant may know

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when he is to attend for the purpose of prosecuting his appeal. It is imperative that that form should substantially be followed. Sect. 85 requires the notice to be "in the form or to the effect of schedule (No. 19)," and a notice which does not specify the date does not comply with that requirement. The appellant has to give ten days' notice of his intended appeal, and if the holding of the quarter sessions may be advanced without affecting the validity of the notice of application the effect may be to deprive the public of their right of appeal. That cannot have been intended by the Legislature when passing the Assizes and Quarter Sessions Act, 1908. There are numerous decisions, of which *Rex* v. *Surrey Justices* (1) is an example, which show how careful the Courts are to protect the rights of the public, and how they insist on a literal compliance with the provisions of the statute.

Disturnal, K.C., and *McCurdy*, in support of the rule. The insertion in the notice of the date of the intended application is not essential to the validity of the notice. All that Form 19 meant by leaving a blank for the date was that the notice must state at which of the four quarter sessions it is proposed to make the application, and filling in the date is only one mode of stating that. It is enough to say that the application will be made "at the summer sessions." If the date of the quarter sessions should be altered from the ordinary date as fixed by the 11 Geo. 4 & 1 Will. 4, c. 70, the public will be given due notice of that fact, and an appellant will not be prejudiced by the alteration. By s. 118 of the Highway Act, 1835, "The forms of proceedings relative to the several matters contained in this Act, which are set forth and expressed in the schedule hereto annexed, shall be used upon all occasions with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and no objection shall be made or advantage taken for want of form in any such proceedings by any person whomsoever."

VISCOUNT READING C.J. The question to be decided in this case arises under s. 85 of the Highway Act, 1835. In accordance with the provisions of that section notice was given following form 19 of the schedule and stating that an application would be made to

(1) [1908] 1 K. B. 374.

quarter sessions on July 4 for an order diverting the highway therein specified. The notice was in accordance with the statute publicly affixed at the ends of the road and advertised in the local press, and the only question is whether the notice is bad by reason of its stating that the date of the intended application was July 4. That was the date on which it was expected that the summer quarter sessions of the county would be held. The certificate, which was given by the justices as the result of proceedings which had been initiated as early as March of the same year, was lodged with the clerk of the peace on May 21, and it is worthy of observation that in that certificate also the date mentioned is July 4. On May 25 there was a special meeting of the justices under s. 3 of the Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), at which they resolved to alter the date for the holding of the summer quarter sessions from July 4 to June 20, and they were in fact held on that date accordingly, and the application was then made by the Glossop Corporation to the quarter sessions under s. 85 for the enrolment of the certificate. The justices in quarter sessions decided that, having regard to the date mentioned in the notice, they had no jurisdiction to hear the case. Thereupon an application was made to this Court for a rule for a mandamus commanding the justices to hear and determine the matter. The justices, having been apprised that these proceedings were about to be taken, very properly adjourned the sessions so that, in the event of this Court taking a different view, they might be able to adjudicate upon the matter as if it had come before them on July 4. I am not surprised that they felt a difficulty in dealing with the question. The Courts have always held that in any proceedings under s. 85 scrupulous care must be taken to safeguard the rights of the public and secure to them the benefit of the provisions which the Legislature has enacted for their protection; and the only point is whether this is one of those cases in which the Court has to follow the exact wording of the statute, and is consequently bound to hold that the quarter sessions held on June 20 was not the quarter sessions held on July 4. In my opinion, when one examines the statute closely there is not only no substance in the objection taken to the notice, but there is no reason in fact why the Court should give effect to what would be an ultra-technical reading of the

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language of the statute. Sect. 85 provides that in the event of the justices thinking that it is desirable that the highway should be diverted "the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (No. 19) to this Act annexed." Then by s. 118 the forms of proceedings set out in the schedule are to be used "with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case," and no objection is to be made for want of form in any such proceedings. That means substantially that you must give the particulars required by the statute, but you need not follow the exact language of the form; and I come to the conclusion that, although in the form there is a blank left for the insertion of the date on which the application to the quarter sessions will be made, it is quite unnecessary to state the date so long as there is a clear indication of the particular quarter sessions at which the application will be made. This has become of particular importance since the introduction of the statutory power of altering the date of the sessions, and it would be better if those who have to give these notices would adopt the form which was suggested by the Court during the argument, namely, "that the application will be made on the day on which the quarter sessions will sit next after the expiration of four weeks from the date of the certificate being lodged." That would avoid all the difficulties that have arisen in this case. No doubt if the notice be given in that form the result will be that if the justices advance the date of the holding of the sessions the time allowed to members of the public for appealing against the diversion order will be to that extent curtailed, but I think that that is immaterial and that when Parliament said that notice must be given of the date on which the application to quarter sessions would be made it had in mind the particular Court of quarter sessions and not the precise day on which the Court would sit; and in providing that the application must be made to a Court sitting next after the expiration of four weeks from the day of the certificate being lodged it afforded the public full opportunity of exercising their right of appeal. The certificate in this case was lodged on May 21. The sessions was held on June 20 that is after the expiration of four weeks from May 21. The consequence is that in this case the public had all the protection which

the statute aimed to secure. It is only necessary to add that if the view we have adopted is not the right one, it is difficult to see how s. 85 could be worked. The truth is that Parliament when it passed the Assizes and Quarter Sessions Act, 1908, had not this point in mind, and omitted to deal with it; but the answer may well be that it thought the notice which would be given of any alteration of the date of the quarter sessions would be sufficient to meet the case. I am of opinion that the justices in this case had jurisdiction to entertain the application, and that the rule for a mandamus must be made absolute.

RIDLEY J. I agree and have nothing to add.

ATKIN J. I am of the same opinion. The only matter on which I wish to say a word is as to the possible suggestion that this decision may affect the rights of the public in the matter of appeal. It is clear that the result of advancing the date of the quarter sessions is that the time for giving notice of appeal is shorter than that fixed by the notice of application; but by the statute the public are to take the date of the quarter sessions to which they are to appeal, not from the notice of application, but from the section which gives them the right of appeal, s. 88. That section says that they may appeal to "the said quarter sessions," and that refers to the quarter sessions mentioned in s. 85, which is "the quarter sessions which shall be holden . . . . next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace." There is therefore no real difficulty as far as the rights of the public are concerned.

Rule absolute.

Solicitor for corporation of Glossop: *T. W. Ellison, Glossop.*

Solicitors for justices: *Kingsford, Dorman & Co., for N. J. Hughes-Hallett, Derby.*

J. F. C.

1917
July 30.

In re A DEBTOR (No. 28 OF 1917).

Ex parte THE PETITIONING CREDITORS *v.* THE DEBTOR.

Bankruptcy—Corporation as Petitioning Creditor—General Authority to Officer to present Petition—Act of Bankruptcy committed after Date of Authority—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 149.

Under s. 149 of the Bankruptcy Act, 1914, an incorporated company may by resolution under seal give a general authority to one of its officers to present petitions in bankruptcy in the future in respect of acts of bankruptcy which may not have been committed at the date when the authority is given.

In re a Debtor [1915] 1 K. B. 287 explained and distinguished.

APPEAL of petitioning creditors from Birmingham County Court.

The petitioning creditors were a limited company whose directors on December 20, 1912, passed a resolution under seal in the following terms: "It was resolved that Mr. William John Spiller and Mr. William George Martin and each or either of them be authorized to make affidavits and proofs of debt in bankruptcy, and to give proxies on behalf of the company and to present or sue out petitions and notices under the Bankruptcy Act or Acts, and to take all necessary proceedings under the said Acts for the time being of or in relation thereto with power to attend the examination of any bankrupt and other meetings held in connection therewith or of insolvent debtors, and to accept any composition arrangement or dividend, and generally to act in the matters aforesaid as shall appear to them or either of them expedient in the interest of the company." The above-named Mr. W. G. Martin, an officer in the employment of the company and as duly authorized under the above resolution, presented a petition against the debtor on June 19, 1917, founded upon an alleged act of bankruptcy committed on June 11 and 12, 1917.

On July 12, 1917, the petition was heard by the registrar, when it was objected on behalf of the debtor that the authority given by the company to Mr. W. G. Martin in 1912 did not empower him to present a petition founded on an act of bankruptcy committed after

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the date of the resolution. Acting on the decision in *In re a Debtor* (1) the registrar upheld the objection and dismissed the petition with costs.

The petitioning creditors appealed.

E. W. Hansell, for the petitioning creditors. Sect. 149 of the Bankruptcy Act, 1914 (2), is in the same terms as s. 148 of the Bankruptcy Act, 1883, which was explained by the Court of Appeal in *In re Tomkins & Co.* (3) It is true that the decision turned upon the meaning of the word "officer" in the section, but the decision that any person bona fide chosen by a limited company and duly authorized under seal to be its agent for the signing and presentation of a petition in bankruptcy thereby becomes an "officer" of the company for that purpose shows that the section is to be given a wide and not a narrow construction. In that case the authority under which the petition was presented was many years anterior in date to the presentation of the petition, and no objection was taken to it on that ground. Indeed, down to the decision of the Divisional Court in *In re a Debtor* (1) it was common practice for companies to give a general authority to certain persons to take bankruptcy proceedings when in the exercise of their discretion they might consider it proper to do so. It will seriously hamper trading companies if they are to be precluded from granting authority to their officers to act in futuro. A bankruptcy petition is one way of recovering a debt, and it is part of the ordinary business of a company to take steps to prevent the dissipation of its debtor's assets. This can be more promptly done by an officer already authorized to act on behalf of the company than if a meeting of the board of directors has to be specially convened to appoint some one whenever the occasion demands the presentation of a petition. *In re a Debtor* (1) does not decide that there must be a special authority given in each case. The decision turned, not on the fact that the authority given to the company's secretary was anterior in date to the act of bankruptcy, but on the fact that the terms of the authority actually given were exhausted

(1) [1915] 1 K. B. 287.

(2) Bankruptcy Act, 1914, s. 149: "For all or any of the purposes of this Act, a corporation may act by any of its officers authorised in that behalf under the seal of the corporation. . . . ."

(3) [1901] 1 K. B. 476.

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on the presentation of the first petition. That clearly appears from the judgment of Horridge J., although no doubt the observations of Rowlatt J. at the end of his judgment seem to go further.

[HORRIDGE J. The question in that case was whether on the proper construction of the resolution the secretary was authorized to present a second petition. If Rowlatt J. went further it would seem that his observations were obiter.]

The earlier part of Rowlatt J.'s judgment is clearly in accord with the view expressed by Horridge J., and the latter part, upon which no doubt the registrar acted in this case, was not really intended to go beyond the facts of the case.

E. W. Cave, for the debtor. That a company upon its incorporation should be allowed to grant a general authority to any one it pleases to present a petition in bankruptcy is contrary to the policy of the bankruptcy law. A company, like a private person, is bound to exercise its discretion in each case as it arises. A general authority such as was given in this case is therefore bad. *In re Tomkins & Co.* (1) is not an authority upon the question now before the Court; this point was not considered in that case; but the language used by Rigby L.J. seems to contemplate the appointment of a person for the presentation of "a petition," not of petitions in general. The case of *In re a Debtor* (2) is a direct authority in favour of my contention. The language used by Rowlatt J. at the end of his judgment, "Where a company give authority to their officer in general terms it ought to be construed as limited to acts of bankruptcy then existing and not as giving the officer a discretion to present a petition upon any act of bankruptcy subsequently committed that he may think proper," applies exactly to this case and should be followed. [*Ex parte Wallace* (3) was also referred to.]

HORRIDGE J. having stated the facts and read the resolution of the company under which the petition was presented, continued: In my view the authority given by the resolution is sufficient to cover the presentation of this petition. It has been contended on behalf of the debtor that s. 149 of the Bankruptcy Act, 1914, does not empower the giving of a general authority to present bankruptcy petitions in futuro, and the objection prevailed before

(1) [1901] 1 K. B. 476. (2) [1915] 1 K. B. 287.
(3) (1884) 14 Q. B. D. 22.

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the registrar, who considered the point covered by the decision of this Court in *In re a Debtor*. (1) Before considering that case, however, I desire to say that in my opinion the words "authorised in that behalf" which occur in s. 149 of the Bankruptcy Act, 1914, refer to an authority given for the purposes of the Act. In this case an authority was given to Mr. Martin under seal to act on behalf of the company for the purposes of the Bankruptcy Act.

What are the authorities that throw light upon the point now raised? Mr. Hansell cited the case of *In re Tomkins & Co.* (2) There a bankruptcy petition was presented on September 22, 1900, by one Byrne on behalf of a limited company, he being "duly authorised under the seal of the company," by a resolution of the directors passed on November 10, 1892; therefore eight years before the date of the presentation of the petition. The point raised was whether or not the "officer" mentioned in the section of the Bankruptcy Act, 1883, corresponding to s. 149 of the Bankruptcy Act, 1914, must be an officer in the ordinary sense of that term. The Court of Appeal held that any person bona fide appointed under seal by a company to do the act was an "officer" within the section. The point whether or not the presentation of the petition under an authority eight years old was good does not appear to have been raised or decided, although a receiving order was made against the debtor.

I now come to the case upon which the registrar acted—*In re a Debtor* (1), a decision to which I was a party. In order to understand that case it is necessary to look at the facts. There a limited company by resolution under seal dated July 4, 1914, authorized their secretary "to present a petition in bankruptcy on behalf of the company" against the debtor "and to carry on and act in the proceedings subsequent thereto." The secretary accordingly presented a petition founded upon an alleged notice of suspension of payment as the act of bankruptcy. At the hearing the registrar dismissed the petition upon the ground that the notice given by the debtor was insufficient to amount to an act of bankruptcy. On August 1 the company's secretary, without fresh authority, and purporting to act under the authority of the resolution of July 4, presented another petition, the alleged act of bankruptcy being an

(1) [1915] 1 K. B. 287. (2) [1901] 1 K. B. 476.

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execution levied under process in an action in the High Court. The question for the decision of the Court was whether under the words of the resolution of July 4 the secretary was authorized to present the second petition. In giving my judgment I carefully limited my decision to the actual resolution with which I was dealing. That is clear from the language used by me at the end of my judgment, where I said (1): "On July 4, the date of the resolution, the execution which was the foundation of the second petition had not been levied, and I cannot think that the resolution can be construed as authorizing the secretary to present a petition founded upon any act of bankruptcy whether committed before or after the date of the resolution. The authority given by such a resolution must I think be understood as limited to acts of bankruptcy available at that date." Rowlatt J.'s judgment, when carefully read, only means that the resolution in question, wide as it was, could not be taken as an authority to present a petition on a subsequent act of bankruptcy. I think it would seriously hamper business companies in following up defaulting debtors if we had been constrained to place a more narrow construction on s. 149 than that which we now place upon it. The appeal will be allowed and the matter remitted to the registrar for further hearing.

McCARDIE J. I agree. In my opinion s. 149 of the Bankruptcy Act, 1914, should be construed, not narrowly, but broadly. It is obvious that many business companies take advantage of s. 149, and to adopt the narrow view of the section contended for by Mr. Cave would be to disable such companies from conferring power upon their secretary, or their manager or even their managing director, to present petitions in futuro. Business convenience requires, in my view, a liberal interpretation of s. 149. The words "in that behalf" in the section are not intended to limit the operation of the section, but are intended to relate to the totality of operations which may take place by virtue of the Bankruptcy Acts. Under the section I think it is clear that a corporation may grant an authority to an officer to present a petition in the future in respect of acts of bankruptcy which may not have arisen at the date when the authority is given. *In re Tomkins & Co.* (2) is not,

(1) [1915] 1 K. B. 289. (2) [1901] 1 K. B. 476.

indeed, a direct authority upon the point now in question, for the point there actually decided was different from that with which we are dealing, but it is obvious from the judgment of Rigby L.J. that the Court of Appeal considered that a broad rather than a restricted meaning should be given to the words of s. 149, and it is difficult to believe that if Mr. Cave be correct in his contention, that a general authority such as that given in this case is invalid, the point would have been overlooked by Vaughan Williams L.J., who was a member of the Court.

I desire to add two observations—first, that in my opinion *Ex parte Wallace* (1) indicates that it is in no way contrary to the policy of the bankruptcy law that an authority to act in futuro should be given, and, secondly, that the true meaning of the language used by Rowlatt J. in *In re a Debtor* (2) is that which has been given by Horridge J. If the words go further than I take them to mean they go too far and cannot, in my view, be supported.

Appeal allowed.

Solicitors for petitioning creditors: *Jacques & Co., for Edwin Jacques & Sons, Birmingham.*

Solicitors for debtor: *Ward, Bowie & Co., for Cochrane & Co., Birmingham.*

(1) 14 Q. B. D. 22.

(2) [1915] 1 K. B. 287.

J. S. H.

1917
May 17.

C. SHARPE & CO., LIMITED *v.* NOSAWA & CO.

[1915 C. 3510.]

Sale of Goods—C.i.f. Contract—Non-delivery—Time for measuring Damages—Arrival of Shipping Documents—Arrival of Goods—"Time or times when they ought to be delivered"—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 51, *sub-s.* 3.

By s. 51, sub-s. 1, of the Sale of Goods Act, 1893, where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. By sub-s. 3, where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when they ought to have been delivered.

Merchants in Japan sold goods to be shipped in June at a price including cost, freight, and insurance to London. Shipping documents, including the bill of lading and policy of insurance, relating to the last possible shipment in June would, if sent forward with reasonable dispatch, have reached London on July 21; the goods themselves would have arrived on August 30. The goods were not shipped. In an action by the buyers for non-delivery:—

Held, that the delivery intended by the contract was a constructive delivery by tender of the shipping documents as soon as possible after shipment, and that there was a breach of contract on July 21.

Held, also, that the damages were to be measured by the difference between the contract price and the market price on July 21, as that date, and not August 30, was the time when the goods ought to have been delivered within the meaning of s. 51, sub-s. 3, of the Act.

Held, further, it being impossible to buy similar goods coming forward on a June shipment but possible to buy such goods on the spot, that a merchant in the circumstances acting reasonably would have bought goods on the spot, and that the price of such goods should be regarded in measuring the damages.

TRIAL of action before Atkin J. without a jury.

The plaintiffs were seed merchants, of Sleaford in Lincolnshire. The defendants were merchants carrying on business in Japan and having an office in London.

In April, 1914, the parties entered into two contracts for the sale by the defendants to the plaintiffs of two parcels of Japanese peas upon a sample sent to this country. One contract was for 50 tons

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at 10*s.* 6*d.* a cwt. c.i.f. London May shipment; the second was for 100 tons on the same sample at 10*l.* 15*s.* a ton c.i.f. London June shipment. In respect of the first contract a portion of the goods was shipped by the *Agapenor*, which left Japan on May 24 and arrived on July 21. In the meantime a bulk sample had been sent with the shipping documents and arrived in this country some time before June 16. On comparison of the bulk sample with the contract sample the plaintiffs rejected the goods on the ground that they were not equal to sample. A further shipment consisting of the rest of the 50 tons under the first contract and $6\frac{1}{4}$ tons under the second contract was sent by the *Phemius*, which left Japan on June 9 and arrived on August 4. In the case of this shipment also a shipping sample was sent forward with the shipping documents and arrived on June 30; and this shipment, like the former, was rejected by the plaintiffs. The parties negotiated with a view to both shipments being accepted with an allowance in the price, and, as the result of an arbitration, the plaintiffs accepted the shipments with an allowance of 1*s.* per ton in the one case and 1*s.* 2*d.* per ton in the other. Neither of the shipments was in fact equal to sample.

As to the balance, $93\frac{3}{4}$ tons, of the second contract, on June 16 the plaintiffs had cabled to the defendants that they refused to accept the goods as the shipping sample was inferior in every respect. The defendants replied that the quality was equal to sample and that they would cancel the balance. The plaintiffs answered that the quality was not equal to sample, that they refused point blank, and would claim damages. On June 17 they wrote requiring the defendants to send the goods in accordance with the terms of the purchase. On June 18 the defendants, confirming their telegram of June 16, wrote to say that they would cancel the contract. The plaintiffs received this letter on July 6. They replied to it on July 29, asking if they were to understand that the defendants had not shipped the balance of the goods equal to sample and requesting them to cable at once, otherwise they would have to buy against them. The defendants did not answer this letter.

If the goods had been shipped on the last possible day for a June shipment and the shipping documents had been forwarded as they had been in the case of the shipments by the *Agapenor* and the *Phemius*, the documents would have arrived in London on or about

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July 21, and the goods themselves would have arrived on or about August 30. Neither the documents nor the goods were ever sent. On December 23, 1915, the plaintiffs issued the writ in this action claiming damages for non-delivery of the $93\frac{3}{4}$ tons. The question was as to the measure of damages. The defendants paid into Court a sum equal to 12*l.* per ton, alleging that to be the value of similar goods procurable in London on July 21. The value of similar goods on August 30 was 17*l.* 10*s.* per ton. The plaintiffs claimed damages on that basis.

T. Hollis Walker, *K.C.*, and *Goodman*, for the plaintiffs. A cost, freight, and insurance contract is a contract for the sale of goods, and not merely for the sale of the shipping documents: *Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1) The defendants have refused to deliver. By s. 51, sub-s. 3, of the Sale of Goods Act, 1893 (2), the measure of damages is the difference between the contract price and the market price of the goods at the time when they ought to have been delivered. The time when goods shipped towards the end of June ought to have been delivered was at the end of August. Assuming that there was an anticipatory breach by the defendants on June 16 when they insisted that they would cancel the contract, or on July 21 when the shipping documents did not arrive, the plaintiffs then were entitled, but not bound, to rescind the contract. They had a right to wait till the time came for performance, i.e., till the end of August, and then measure their damages: *Michael* v. *Hart & Co.* (3)

There was no market for these goods on July 21. They were of a special quality not procurable. The defendants, who have broken

(1) [1916] 1 K. B. 495.

(2) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51: "(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

"(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

"(3.) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

(3) [1902] 1 K. B. 482.

their contract, cannot insist that the plaintiffs shall go into the market and buy goods which they did not order and do not want.

Roche, K.C., and *Whately*, for the defendants. The duty of a seller who sells goods on cost, freight, and insurance terms is to ship the goods according to the contract and to send forward as soon as he can an invoice, a bill of lading, and a policy of insurance: *Ireland* v. *Livingston* (1), per Blackburn J.; *Biddell Brothers* v. *E. Clemens Horst Co.* (2), per Hamilton J. As a general rule the goods are sold and delivered and the property in them has passed when they are shipped: Sale of Goods Act, 1893, s. 32; s. 18, r. 5. But the seller is bound to give the buyer as soon as possible the means of dealing with the goods or their value, and so he must send forward the bill of lading and policy of insurance: *Sanders* v. *Maclean.* (3) If he does this he is generally entitled to payment in return for the documents: *Biddell Brothers* v. *E. Clemens Horst Co.* (4), per Kennedy L.J., affirmed in the House of Lords. (5) If he fails to do this he commits a breach of his contract. The delivery contemplated by such a contract is a constructive delivery by tender of the documents, and the time for measuring the damages is the time when the documents would have been tendered if the contract had been performed; that is, in this case, on July 21. On that day the plaintiffs would have had complete control over the goods, which might have been sold and resold many times before August 30. Unless it was a term in the contract that the plaintiffs should be in possession of the goods on August 30, the defendants are not to be affected by the market price on that date. It was no part of their contract to be liable for fluctuations in the market throughout the month of August.

The difference in quality between the goods sold and those procurable in the market at the end of July did not amount to a difference in kind.

T. Hollis Walker in reply.

ATKIN J. The question is whether the damages are to be measured by the price of peas in July, when the documents would have arrived

(1) (1872) L. R. 5 H. L. 395, 406.
(2) [1911] 1 K. B. 214, 220
(3) (1883) 11 Q. B. D. 327.
(4) [1911] 1 K. B. 934.
(5) [1912] A. C. 18.

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in the ordinary course, or the price in August, when the goods would have arrived on a June shipment, assuming that the voyage took two months. The answer depends upon the true meaning of a c.i.f. contract of this kind. It is reasonably plain that such a contract is performed by the vendor taking reasonable steps to deliver as soon as possible after shipment the shipping documents, including the bill of lading and policy of insurance, and the buyer paying the price against the documents unless there is some other stipulation as to payment in the contract. But performance by the seller is by delivery of the documents which represent the goods, i.e. the bill of lading, which is a constructive delivery. The delivery intended by the contract is a constructive delivery. The bill of lading is, in the words of Bowen L.J. (1), a great master of the common law, " a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be," and is therefore a constructive delivery of the goods to the buyer, who from the time he receives the documents has control of the goods and can deal with them relying on their receipt, or, by virtue of the insurance, their value, so that there can be no doubt in his mind that he has the control of existing goods or their value. The position is one which has been expounded finally by the judgment of Kennedy L.J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (2) That was a dissenting judgment, but, in view of the comments made upon it in the House of Lords (3), it must be treated as authoritative. One passage I ought to read : " Secondly, if there is a duty on the vendor to tender the bill of lading, there must, it seems to me, be a corresponding duty on the part of the purchaser to pay when such tender is made. Very relevant on this point is the language of Brett M.R. in his judgment in *Sanders* v. *Maclean* (4), which applies to this class of contract the same principle as was expounded by Bowen L.J. in *The Moorcock.* (5) He said ' The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable ' ; and, if it be the duty implied in the c.i.f. contract, as held by Brett M.R. in

(1) *Sanders* v. *Maclean*, 11 Q. B. D. 327, 341.
(2) [1911] 1 K. B. 934, 958.
(3) *E. Clemens Horst Co.* v. *Biddell Brothers* [1912] A. C. 18, 22.
(4) 11 Q. B. D. 327, 337.
(5) (1889) 14 P. D. 64.

that case, that the vendor shall make every reasonable exertion to send forward and tender the bill of lading as soon as possible after he has destined the cargo to the particular vendee, it is, I venture to think, 'mercantilely reasonable' that the purchaser should be held bound to make the agreed payment when delivery of the goods is constructively tendered to him by the tender of the bill of lading, either drawn originally in his favour or indorsed to him, and accompanied in case of loss by the policy of insurance. For thereunder, as the bill of lading with its accompanying documents comes forward by mail, the purchaser obtains the privilege and absolute power of profitably dealing with the goods days or weeks, or, perhaps, in the case of shipments from a distant port, months, before the arrival of the goods themselves. This is, indeed, the essential and peculiar advantage which the buyer of imported goods intends to gain under the c.i.f. contract according to the construction which I put upon it."

The right view of that passage is that the Lord Justice intended to adopt the judgment of Brett M.R. in *Sanders* v. *Maclean* (1) that it is the duty of the vendor to make every reasonable effort to send forward and tender the bill of lading as soon as possible after he has destined the cargo to the particular vendee. He assumes that if there is a mail the vendor will transmit the documents so that they will arrive before the ship. That is clearly the right view. The contract is performed in fact, and the date of its performance is the date when the documents would come forward, the vendor making every reasonable effort to forward them. In this case, on the evidence, such a period would be twenty to twenty-one days after the ship sailed. Not only from the course of business in this case, but from ordinary commercial usage, it would be reasonable for the vendor to send the documents by the mail by the Trans-Siberian Railway as soon as the goods had been shipped. They would have arrived on July 21—that is, twenty or twenty-one days after the latest possible June shipment. They did not arrive on July 21, and there was consequently a breach of the contract on that date. What, then, is the remedy of the buyer? His remedies are specified in s. 51 of the Sale of Goods Act, 1893. His right is to place himself as nearly as possible in that position in which he would have been if the contract had been fulfilled.

(1) 11 Q. B. D. 327.

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In this case there is first the question could the buyers have gone into the market at the time when the contract ought to have been performed and have bought goods c.i.f. June shipment. If so, the difference of price would be the measure of damages. I am not satisfied that they could in fact have bought 93 tons of Japanese peas c.i.f. June shipment, although there was some evidence that they could have bought smaller parcels. The damages are to be assessed on the basis of reasonable conduct on the part of the purchaser. In the circumstances of this case the reasonable thing for a merchant to do who could not buy goods coming forward would be to go into the market and buy goods on the spot. In that way he would put himself as nearly as may be in the same position as if the contract had been fulfilled, and would have got control of an equivalent amount of goods. It is true he may incur further expense by reason of having to take up goods at once, the cost of warehousing, insuring, &c., but that would be a part of his damages. It has been suggested that he might and ought to wait until the goods would have arrived. That, in my view, puts him into a different position. If the contract had been performed he would have had control of the goods at the time when the documents would have arrived. If he awaits the arrival of the goods, inasmuch as that may not happen for weeks or months, he is in the meantime subjecting the vendor to the risk of fluctuations in the market not contemplated by the parties and not reasonable. The reasonable course was for the plaintiffs to go into the market and buy goods. There is no doubt that they could have bought Japanese peas on the spot in July. They would have bought ex wharf and would have had to pay more in respect of landing charges, but they would have got a month's credit. In the normal course the goods would have arrived towards the end of August. The plaintiffs could have warehoused the substituted goods for fourteen days free of charge. The cost of warehousing till the end of August, so as to put themselves in the same position as if the goods had arrived in the ordinary course, would be a small matter.

It was said that the plaintiffs could not have bought these goods; that the contract was for Japanese peas of a very special quality, of better than fair average quality. I cannot accept that view. They were of more than fair average quality, but they were Japanese

peas, and the difference between them and those which the plaintiffs could have bought on the spot was not so great as to amount to a difference of kind or character. It is hardly possible to match a particular sample precisely, but that is a matter which can be adjusted when assessing damages. As far as I can see, in July the plaintiffs could not have bought goods of this particular quality; but they were entitled to buy, and should have bought, goods as near in quality as possible to the goods the defendants contracted to sell.

The only other question is as to "the time or times when they"—i.e. the goods—"ought to have been delivered" within the meaning of s. 51 of the Sale of Goods Act, 1893. Those words mean the time or times when they ought to be delivered according to the mode of delivery contemplated by the contract. If the contract provides for delivery of goods by means of documents, or by handing over the key of a warehouse, the date for that event is "the time . . . . when they ought to have been delivered." In this case the date on which the documents ought to have arrived, that is to say July 21, is the important date in considering when the plaintiffs ought to have bought in the market. No doubt the plaintiffs ought to have a reasonable time in which to consider their position. The time cannot be indefinitely extended on the assumption that the plaintiffs could waive the term that the shipment should be in June. The matter has to be considered as between vendor and vendee on a contract to be performed strictly as to time. In these circumstances I fix the time for ascertaining the market or current price as somewhere about the last week in July. It is not necessary to fix the price very definitely, because the defendants have paid into Court the equivalent of 12*l.* a ton, and that is a sufficient allowance for all extra considerations. If August is the proper time to fix the market price, the price then was 17*l.* 10*s.* But in my view the end of July is the proper time, and the defendants have paid a sufficient sum into Court. In the result the defendants are entitled to judgment, but the plaintiffs get the costs of the action up to the date of payment into Court by the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Fraser & Christian.*
Solicitors for defendants: *Enever & Aarons.*

W. H. G.

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May 23;
June 5, 6, 13.

ARMSTRONG *v.* JACKSON.

[1915 A. 1002.]

Contract—Sale—Principal and Agent—Fiduciary Relation—Fraud—Rescission—Restitutio in integrum—Fall in Value of Thing sold.

Where a broker, pretending to execute a mandate to buy, sells his own property, the sale may be rescinded notwithstanding that the value of the thing sold has decreased between the date of the sale and the date of the action for rescission.

Dictum of Lord Cranworth in *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 H. L. Sc. 145, 166, approved.

Dicta in *Clarke* v. *Dickson* (1858) E. B. & E. 148 disapproved.

TRIAL of action before McCardie J. without a jury.

The following statement of the facts is taken from the written judgment of the learned judge :—

The plaintiff is a medical man without business experience. The defendant is a stockbroker and a member of the London Stock Exchange. Prior to April, 1910, the defendant had acted as stockbroker for the plaintiff and had carried through several transactions for him. On April 12, 1910, the plaintiff by telegram instructed the defendant to buy for him 600 shares in a company known as the Champion Gold Reefs of West Africa, Limited. The capital of the company was 50,000*l.* in 200,000 shares of 5*s.* each. On the evening of April 12 the defendant wrote to the plaintiff informing him that his order had been executed, and sent with the letter a contract note in the ordinary form, purporting to show that the 600 shares had been purchased at the price of $2\frac{29}{32}$*l.* per share. The total amount debited against the plaintiff was the sum of 1758*l.* 16*s.* This sum included a charge of 15*l.* for the services of the defendant as broker. The plaintiff did not immediately take up the shares. The defendant purported to carry them over from account to account on the plaintiff's behalf. He charged a contango rate varying from 7 per cent. to 8 per cent. The continuation notes stated that this rate included remuneration to the defendant for his services as broker in effecting the continuations. The shares gradually fell. The plaintiff paid the resultant differences. He became anxious. He asked the defendant for his views. The defendant advised him to

take up the shares. In pursuance of that advice the plaintiff took a transfer of the shares in December, 1910, and paid the price to the defendant. The plaintiff continued to hold the shares as the duly registered proprietor thereof. The years passed on. In the summer of 1915 the plaintiff heard rumours which awakened his suspicions. His solicitor wrote to the defendant for the name of the jobber from whom he had bought the 600 shares on the plaintiff's behalf. No satisfactory answer was given, and thereupon this action was commenced. Discovery of documents was obtained and interrogatories were administered. As a result of these proceedings it has been established that the defendant had never purchased any of the shares for the plaintiff. The contract note of April, 1910, was wholly fictitious. It was a mere sham. The defendant had not carried over any of the shares on behalf of the plaintiff. The contango notes were fictitious. It is equally clear that the shares which were transferred to the plaintiff in December, 1910, were not the shares of a third party, but were the defendant's own shares. The defendant had been a promoter of the Champion Gold Reefs of West Africa. He had received by allotment a large block of shares on the formation of the company, including the shares transferred to the plaintiff in December, 1910. From first to last the defendant made no disclosure whatever to the plaintiff of the true facts. He purported to act as a broker, whereas in fact he was really acting as a principal. The plaintiff was deceived throughout. Hence the plaintiff claims (*a*) that the whole transaction be set aside, or (*b*) alternatively that the defendant be ordered to pay compensation for breach of duty. It should be added that the value of Champion Gold Reef shares at the date of the writ was about 5*s.* per share.

Schiller, K.C., and *H. G. Robertson*, for the plaintiff.
Disturnal, K.C., and *Frampton*, for the defendant.

June 13. McCardie J. read a judgment which, after the statement of the facts set out above, proceeded as follows:—First as to the claim to avoid the transaction. It is obvious that the defendant gravely failed in his duty to the plaintiff. He was instructed to buy shares. But he never carried out his mandate. A broker who

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is employed to buy shares cannot sell his own shares unless he make a full and accurate disclosure of the fact to his principal, and the principal, with a full knowledge, gives his assent to the changed position of the broker. The rule is one not merely of law but of obvious morality. As was said by Lord Cairns in *Parker* v. *McKenna* (1), "No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict." Now a broker who secretly sells his own shares is in a wholly false position. As vendor it is to his interest to sell his shares at the highest price. As broker it is his clear duty to the principal to buy at the lowest price and to give unbiassed and independent advice (if such be asked) as to the time when and the price at which shares shall be bought, or whether they shall be bought at all. The law has ever required a high measure of good faith from an agent. He departs from good faith when he secretly sells his own property to the principal. The rule has long been the same, both at law and equity: see Story on Agency, s. 210. It matters not that the broker sells at the market price, or that he acts without intent to defraud: see *Bentley* v. *Craven*. (2) The prohibition of the law is absolute. It will not allow an agent to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal: see per Romilly M.R. in *Bentley* v. *Craven*. (2) The Court will not enter into discussion as to the propriety of the price charged by the broker, nor is it material to inquire whether the principal has or has not suffered a loss. If the breach of duty by the broker be shown, the Court will set aside the transaction: see *Gillett* v. *Peppercorne*. (3) The rule was strikingly illustrated in the case of *Rothschild* v. *Brookman*. (4) The facts in that case were not dissimilar to the facts in the present action. The House of Lords (affirming the Court below) set aside transactions in which the agent had secretly acted as principal. In giving his opinion Lord Wynford (formerly Best C.J.) used these words: "If any man who is to be trusted places himself in a condition in which he has an opportunity of taking advantage of his employer, by placing himself in such a situation, whether acting fairly or not, he must suffer the

(1) (1874) L. R. 10 Ch. 96, 118.
(2) (1853) 18 Beav. 75.
(3) (1840) 3 Beav. 78.
(4) (1831) 5 Bli. (N.S.) 165, 197.

consequence of his situation. Such is the jealousy which the law of England entertains against any such transactions."

It follows that in the present case the plaintiff is prima facie entitled to a decree setting aside the transaction in question. But Mr. Disturnal, for the defendant, vigorously contended that no such decree can here be made. In the first place it was argued that, inasmuch as the contract between the parties was executed, no rescission can be granted unless fraud be proved against the defendant. Now it is undoubted law that where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase, prior to completion, even though the misrepresentation be innocent: see per Jessel M.R. in *Redgrave* v. *Hurd* (1); per Lord Bramwell and Lord Herschell in *Derry* v. *Peek*. (2) But if the contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel, then rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor. When the contract is so completed, fraud must be proved before rescission can be granted: see per Lord Campbell in *Wilde* v. *Gibson* (3); *Seddon* v. *North Eastern Salt Co.* (4); and *Angel* v. *Jay*. (5)

That is the settled rule, and it is too late to regret the limitation which has been placed on the equitable doctrine of rescission on the ground of misrepresentation. It is curious that the doctrine should cease to apply when the formal instrument of transfer has been executed, or the formal delivery of a chattel has taken place. In many cases the misrepresentation cannot, or may not, be discovered until the purchaser has secured his legal title and has therefore entered into possession of his newly acquired property. But in my opinion the rule formulated in *Seddon* v. *North Eastern Salt Co.* (4) has no application to such a case as the present. It is to be observed that in that case the dispute was between vendor and vendee. In *Angel* v. *Jay* (5) the dispute was between lessor and lessee. In *Wilde* v. *Gibson* (3) Lord Campbell was referring in his opinion to a dispute between seller and purchaser. In none of these cases did the question of fiduciary relationship arise. Where

(1) (1881) 20 Ch. D. 1, 12.
(2) (1889) 14 App. Cas. 337, 347, 359.
(3) (1848) 1 H. L. C. 605, 632.
(4) [1905] 1 Ch. 326.
(5) [1911] 1 K. B. 666.

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that relationship exists the rule is infinitely stricter and more severe. The position of principal and agent gives rise to particular and onerous duties on the part of the agent, and the high standard of conduct required from him springs from the fiduciary relationship between his employer and himself. His position is confidential. It readily lends itself to abuse. A strict and salutary rule is required to meet the special situation. The rules of English law as they now exist spring from the strictness originally required by Courts of Equity in cases where the fiduciary relationship exists. Those requirements are superadded to the common law obligations of diligence and skill: see per Lord Cranworth in *Aberdeen Ry. Co.* v. *Blakie Brothers* (1) and per Curiam in *Oliver* v. *Court.* (2)

It is, I think, immaterial that the plaintiff in the present case took a transfer of the shares and became the registered holder thereof. Those facts do not impair his right to rescission. So to hold would gravely and injuriously impair the powers of the Court. In *Gillett* v. *Peppercorne* (3) the plaintiffs had taken a transfer of shares in circumstances similar to those now before me, yet Lord Langdale at once set aside the transactions and directed the defendant to repay the purchase-money with interest. The contract in that case was as fully executed as in the present case. In *Rothschild* v. *Brookman* (4) the contracts were also, I think, as much executed as in the present case. Yet the House of Lords, without hesitation, set aside the transactions. I also refer to the case of *York Buildings Co.* v. *Mackenzie* (5), referred to by Lord Cranworth in *Aberdeen Ry. Co.* v. *Blakie Brothers* (6), and to the case of *Oliver* v. *Court.* (7) These decisions are clearly opposed to the contention of Mr. Disturnal. I may add that the various authorities I have referred to are quite independent of the proof of actual fraud as defined by *Derry* v. *Peek.* (8) The ratio of those decisions is wholly different from the ratio in *Derry* v. *Peek* (8), for they rest upon the fundamental basis of fiduciary relationship, and they are unaffected by the opinion of the House of Lords in *Derry* v. *Peek.* (8) But none the less it is

(1) (1854) 1 Macq. 461, 472 et seq.
(2) (1820) 8 Price, 127, 161.
(3) 3 Beav. 78.
(4) 5 Bli. (N.S.) 165.
(5) (1795) 3 Pat. App. Cas. 378.
(6) 1 Macq. 474.
(7) (1820) Dan. 301.
(8) 14 App. Cas. 337.

clear that the agent who secretly sells his own property to a principal is guilty of dishonesty; and it was said by Lord Eldon in *Ex parte Dyster* (1) that if a man "mixes in a transaction, in which he is ostensibly the broker, but really a buyer or seller, this is a gross fraud."

I decide against the first contention of Mr. Disturnal. If, however, a finding against the defendant of personal deceit be essential to the plaintiff's claim for rescission, then I regret to say that I feel no doubt that such a case has been established. A misrepresentation will be fraudulent if made with a knowledge of its falsity even though the defendant may not actually intend to injure the plaintiff: see *Polhill* v. *Walter* (2); *Foster* v. *Charles* (3); *Derry* v. *Peek*. (4) Here the contract note of April, 1910, and the whole of the subsequent continuation notes and other documents were false. They were intended to deceive the plaintiff. They achieved that purpose. I am satisfied that the defendant was aware throughout of what was taking place, and when the plaintiff paid his purchase-money in December, 1910, the amount thereof went at once into the pocket of the defendant. It is impossible for me to accept the defendant's statement that he was ignorant of what was taking place. He was the sole proprietor of the business. He did not allege that his clerk or manager acted without his authority. The defendant attended regularly at his office. He supervised the correspondence and personally signed many of the letters which were given in evidence before me. He had acted towards other persons in the manner complained of in this case. Prior to April, 1910, he had encouraged the plaintiff to buy Champion Gold Reef shares. On December 30, 1909, he wrote to the plaintiff that he anticipated a "big rise in prices." He sent a prospectus of a glowing nature. He knew that the plaintiff was wholly inexperienced. He wrote a letter on February 18, 1910, to the plaintiff to state that the shares *looked* an extremely good market. His letter of February 21, 1910, is to the same effect. He did not actually advise the purchase of the 600 shares now in question, but I have no doubt that his previous statements largely influenced the plaintiff to send the telegram of April 12, 1910. In any event, I may add, the defendant would

(1) (1816) 1 Mer. 155, 175.
(2) (1832) 3 B. & Ad. 114.
(3) (1830) 6 Bing. 396.
(4) 14 App. Cas. 337, 365.

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be responsible in this case for the fraud of his agents in view of the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (1); and see, too, *Refuge Assurance Co.* v. *Kettlewell* (2) and *Brady* v. *Todd.* (3)

I turn now to the second contention of Mr. Disturnal with respect to the claim for rescission. He argued that no decree should be granted inasmuch as the circumstances had changed through the lapse of time and that the plaintiff could not restore in 1917 that which he had received from the defendant in 1910. The shares in 1910 stood at nearly 3*l.* for each 5*s.* share. They are now worth 5*s.* only, or slightly less, and at such a price they have been standing at and since the issue of the writ. But in my view this second contention fails also, although, of course, it is clear law that restitutio in integrum is essential to a claim for rescission. The plaintiff still holds the shares he bought in 1910. He can hand them back to the defendant. The company is the same as in 1910. Its name only has been changed. The objects of the company have not changed though the assets of the company may have varied. The market valuation of the shares has greatly dropped, but the shares are the same shares. In my view the words of Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (4), quoting *Clough* v. *London and North-Western Ry. Co.* (5), have no application to the present case. In the *Erlanger Case* (4) Lord Blackburn says this: "'We think that so long as he has made no election he retains the right to determine it either way; subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.' It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a restitutio in integrum. The parties must be put in statu quo. See per Lord Cranworth in *Western Bank of Scotland* v. *Addie.* (6) It is a doctrine which has often been acted upon both at law and in equity." I think that such words refer to a delay which occurs after a plaintiff has ascertained his right to rescind and whereby the

(1) [1912] A. C. 716, 738.
(2) [1909] A. C. 243.
(3) (1861) 9 C. B. (N.S.) 592, 606.
(4) (1878) 3 App. Cas. 1218, 1278.
(5) (1871) L. R. 7 Ex. 26, 35.
(6) L. R. 1 H. L. Sc. 145, 165.

position of a defendant is substantially altered and prejudiced. No such delay has here occurred, inasmuch as the plaintiff acted with promptitude in issuing his writ when he became suspicious of the defendant's conduct. The phrase "restitutio in integrum" is somewhat vague. It must be applied with care. It must be considered with respect to the facts of each case. Deterioration of the subject-matter does not, I think, destroy the right to rescind nor prevent a restitutio in integrum. Indeed, it is only in cases where the plaintiff has sustained loss by the inferiority of the subject-matter or a substantial fall in its value that he will desire to exert his power of rescission. Such was the state of things in *Rothschild* v. *Brookman*. (1) Such, I infer, was the state of things in *Gillett* v. *Peppercorne* (2), where the plaintiff alleged that he had paid extravagant prices for the shares. Such too, I infer, was the state of things in *Oelkers* v. *Ellis*. (3) If mere deterioration of the subject-matter negatived the right to rescind, the doctrine of rescission would become a vain thing. Rescission was refused in *Clarke* v. *Dickson* (4) because the plaintiff had there changed the shares in a company on the cost-book principle into shares in a joint-stock corporation. Upon that ground the decision in *Clarke* v. *Dickson* (4) is correct. The dicta in that case, so far as they go beyond that ground, are not, I think, consistent with the various decisions already cited in this judgment. Rescission was impossible in *Western Bank of Scotland* v. *Addie* (5), inasmuch as the shares purchased by the plaintiff, namely, shares in an unincorporated company, had been changed into shares of a company registered under the then existing Companies Acts. But Lord Cranworth in his opinion (6) used the following words: "I agree with the learned judges below, that the circumstance that the shares, from mismanagement or otherwise, had become depreciated in value subsequently to the purchase by the pursuer, would of itself have been of no importance. He might still have been able to restore that which he was fraudulently induced to purchase." Those words are directly applicable to the present case: see also the American decision of *Conkey* v. *Bond* (7),

(1) 5 Bli. (N.S.) 165.
(2) 3 Beav. 78.
(3) [1914] 2 K. B. 139.
(4) E. B. & E. 148.
(5) L. R. 1 H. L. Sc. 145, 165.
(6) L. R. 1 H. L. Sc. 166.
(7) (1861) 34 Barbour, 276.

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cited in Story on Agency, notes to s. 211. The fall of the shares here is serious. Had, indeed, the plaintiff discovered the fraud at an early date he could have repudiated the transaction whilst the price was still high, and the loss to the defendant would then not have been so great in view of his power to dispose of them on the market. But the plaintiff is in no way to blame, and the considerations of hardship urged before me by Mr. Disturnal were similarly urged in 1856 before Sir John Romilly in a somewhat analogous case. Yet the plea of hardship fails here as it failed sixty years ago. In rejecting the plea of hardship in *Blake* v. *Mowatt* (1) the then Master of the Rolls said: "It is the leading principle of the equity administration in this Court, that truth shall govern all transactions, and that one who deludes another in a contract, or permits him to be deluded, and takes advantage of that delusion, cannot afterwards complain, that, if the contract be set aside, he will be in a worse situation than if the contract had never been entered into."

The extent to which the requirement of restitutio in integrum may be limited in its application is strikingly illustrated by the decision in *Adam* v. *Newbigging*. (2)

I may point out that mere lapse of time is no answer to a plea of rescission. Here some six years elapsed before the plaintiff claimed to rescind. But in *Rothschild* v. *Brookman* (3) and in *Oelkers* v. *Ellis* (4) six years had also elapsed; and in *York Buildings Co.* v. *Mackenzie* (5) eleven years had elapsed, in *Gillett* v. *Peppercorne* (6) fourteen years had elapsed, and in *Oliver* v. *Court* (7) fifteen years had elapsed before the plaintiffs respectively commenced their proceedings to set aside the transaction complained of. In cases like the present the right of the party defrauded is not affected by the mere lapse of time so long as he remains in ignorance of the fraud: see per Lord Westbury in *Rolfe* v. *Gregory*. (8) If, however, he delays his claim to rescission until after the lapse of six years from his discovery of the fraud, then the Court will (apart from any other point) act by analogy to the

(1) (1856) 21 Beav. 603, 613.
(2) (1888) 13 App. Cas. 308.
(3) 5 Bli. (N.S.) 165.
(4) [1914] 2 K. B. 139.
(5) 3 Pat. App. Cas. 378.
(6) 3 Beav. 78.
(7) 8 Price, 127.
(8) (1865) 4 D. J. & S. 576, 579.

Statute of Limitations and refuse to grant relief: see *Oelkers* v. *Ellis*. (1)

I therefore decide against the second contention of Mr. Disturnal upon the question of rescission. The conclusion at which I have arrived with regard to rescission renders it unnecessary to deliver the further observations I had prepared upon several of the points arising on the alternative claim. Those points are important and difficult, and I think it better that they should be determined in a case where they call for direct decision. It follows that the plaintiff is entitled to a decree setting aside the whole of the transactions with respect to the 600 shares. The defendant must repay, with 5 per cent. interest, all sums received by him from the plaintiff, less a credit of 45*l.* for the amount of the dividends received. The plaintiff must transfer the 600 shares to the defendant upon payment of the sum so due from the defendant to the plaintiff.

Judgment for plaintiff.

Solicitors for plaintiff: *Lovell & White.*
Solicitors for defendant: *Hays, Roughton & Dunn.*

(1) [1914] 2 K. B. 139, 151.

W. H. G.

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July 20.

WARD *v.* NIELD.

County Court—Practice—Judgment Debtor—"Travelling expenses"—Return Fare—County Court Rules, 1903 *and* 1914, *Order* XXV., *r.* 26.

The "reasonably sufficient" sum for travelling expenses payable under Order XXV., r. 26, of the County Court Rules, 1903 and 1914, to a judgment debtor, who does not reside in the district of the county court from which a judgment summons is issued, means a sum sufficient to pay for the journey from the debtor's residence to the Court and back again.

APPEAL from Low J. at chambers.

The plaintiff recovered judgment for 8*l.* 4*s.* 8*d.* against the defendant in the county court of Lancashire holden at Bolton. Subsequently a judgment summons was issued by the Bolton County Court at the instance of the plaintiff, calling upon the defendant to appear personally at that Court to show cause why he should not be committed to prison for non-payment of the judgment debt. The defendant did not reside or carry on business, and was not employed, within the district of the Bolton Court, and, therefore, as the plaintiff had not applied for or obtained the leave of the judge for the issue of the summons, a postal order for 5*s.* 6*d.* to cover the defendant's travelling expenses was annexed to the judgment summons at the time of its service upon the defendant. The defendant lived at Alsager in Cheshire, and the price of a single third-class railway fare from Alsager to Bolton was 5*s.* 6*d.* The registrar had fixed the sum for the defendant's travelling expenses at 5*s.* 6*d.*, because he was of opinion that under Order XXV., r. 26, of the County Court Rules, 1903 and 1914 (1), a judgment

(1) County Court Rules, 1903 and 1914, Order XXV., r. 26: "(2.) Where a debtor does not reside and neither carries on business nor is employed within the district of the court in which the judgment or order was obtained, a judgment summons shall not be issued from that court without the leave of the judge. The application for leave shall be made upon affidavit . . . .

"(3.) Provided that no affidavit or leave under the preceding paragraph of this rule shall be required if the person requiring a judgment summons to be issued either

"(*a*) When such summons is

debtor was only entitled to receive for travelling expenses the single fare from his place of residence to the Court, and not a return fare. The defendant returned the postal order to the registrar with a letter in which he stated that owing to lack of means he was unable to attend the Court. In his absence an order for his committal was made on the judgment summons. The defendant thereupon applied at chambers for a writ of prohibition directed to the county court judge and to the plaintiff prohibiting them from proceeding further on the committal order. Low J. dismissed the application. The defendant appealed.

Maddocks, for the defendant. Where it is intended to issue a judgment summons from a county court against a debtor who does not reside or carry on business, and is not employed, in the district of the Court, Order xxv., r. 26, provides that either the leave of the judge must be obtained, or the plaintiff must undertake to pay the debtor's travelling expenses. If neither of these formalities has been complied with the Court has no jurisdiction to adjudicate upon the summons: *McIntosh* v. *Simpkins* (1); *Alderson* v. *Palliser*. (2) By Order xxv., r. 31, a judgment summons shall be deemed to be a summons to a witness within the meaning of s. 111 of the County Courts Act, 1888, and, therefore, in addition to travelling expenses the debtor is entitled to expenses for loss of time according to the scale of allowances. The words "the amount to be fixed by the registrar" in Order xxv., r. 26, refer to the expenses other than travelling expenses. Further, the expression "travelling expenses" means the expense of travelling from the debtor's house to the Court and back again: see the cases cited in the note to *Hallet* v. *Mears* (3) and *In re Working*

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to be served by a bailiff, deposits with the registrar, to be paid or tendered to the judgment debtor with the summons, or

"(*b*) When such summons is to be served otherwise than by a bailiff, gives an undertaking in writing to pay or tender to the judgment debtor with the summons,

a sum reasonably sufficient to cover the travelling expenses of the debtor to attend the court, the amount to be fixed by the registrar."

(1) [1901] 1 K. B. 487.

(2) [1901] 2 K. B. 833.

(3) (1810) 13 East, 15.

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Men's Mutual Society. (1) Sect. 6 of 5 Eliz. c. 9, which provides that there shall be tendered to a witness such a reasonable sum of money for his costs and charges as having regard to the distance of the places is necessary, is still law. The judge at chambers was of opinion that the rule gave a discretion to the registrar which he had exercised and that prohibition would therefore not lie; but it is not disputed that the registrar was of opinion that under Order xxv., r. 26, the debtor was not entitled to receive more than the single fare, and, therefore, in fixing the amount he did not exercise any discretion. The registrar has misconstrued the language of the rule, and in the circumstances the county court judge had no jurisdiction to make a committal order. Prohibition is therefore the proper remedy.

Barrington-Ward, for the plaintiff. A mistake, even of law, on the part of the registrar in fixing the amount of the travelling expenses does not deprive the judge of jurisdiction to adjudicate upon the judgment summons. There is no authority for saying that the travelling expenses of a judgment debtor must include the expenses of travelling both to and from the Court, or that they are necessarily the same as the travelling expenses of a witness.

BAILHACHE J. The question in this case is whether the county court judge had jurisdiction to entertain a judgment summons against the defendant. The defendant resided at Alsager, which is outside the jurisdiction of the Bolton County Court, and therefore the judge had no jurisdiction to deal with the summons unless the case had been brought within the provisions of Order xxv., r. 26, of the County Court Rules. Under that rule jurisdiction might have been given to the Bolton County Court in one of two ways. The plaintiff might have applied on affidavit and obtained the leave of the judge for the issue of the summons, or he might have adopted the alternative method provided by par. 3 of the rule—that is to say, he might have undertaken to pay to the judgment debtor "a sum reasonably sufficient to cover the travelling expenses of the debtor to attend the court, the amount to be fixed by the registrar." The plaintiff acted on that alternative and undertook to pay the defendant's travelling expenses. The single third-class

(1) (1882) 21 Ch. D. 831.

fare from Alsager to Bolton is 5*s.* 6*d.*, and the registrar fixed that sum as being reasonably sufficient to cover such travelling expenses as the defendant was entitled to receive under Order XXV., r. 26. It is obvious that the registrar in fixing the amount at 5*s.* 6*d.* acted on the view that it was only necessary to give a sum sufficient to cover the expense of travelling to the Court, and that it was not necessary to provide for the return journey. If the registrar had merely made a mistake in the amount of the expenses, and had fixed an amount which was in fact insufficient to cover the cost of a return ticket, I should have been of opinion that, the question of the amount being left entirely to the discretion of the registrar, the case was one in which this Court could not entertain an application for a writ of prohibition. But it is conceded that this was not a case in which the registrar had by mistake fixed too small an amount to cover the travelling expenses, but that he had acted on the principle that the rule only authorized the payment of the expenses of travelling to the Court. If the registrar acted on a wrong principle of law his decision is open to review by this Court, and I have no doubt whatever that the travelling expenses referred to in the proviso to Order XXV., r. 26, mean the expenses of travelling from the debtor's home to the Court and back again. The registrar has misinterpreted the rule and this appeal must therefore be allowed.

ATKIN J. I agree. The travelling expenses of a debtor to attend the Court include, in my opinion, the expenses of getting to the Court and of returning from the Court. It is clear from the authorities referred to in a note to *Hallet* v. *Mears* (1) that for a long period it has been the rule that before a witness can be attached for not obeying a subpœna a reasonable sum for his travelling expenses to and from the Court must have been paid or tendered to him; and the same point was decided in *In re Working Men's Mutual Society*. (2) The words "travelling expenses" also occur in Order LIII., r. 39, of the County Court Rules, in which case it cannot possibly be contended that the words do not cover the expenses of travelling both to and from the Court. I can see no reason why the same words in Order XXV., r. 26, should not receive the same

(1) 13 East, 15. (2) 21 Ch. D. 831.

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meaning, more especially as the rule is dealing with the service of a judgment summons, which may result in a committal order, on a debtor who is residing outside the district of the Court, and therefore one may presume that the object of the rule was to place him in the same position as if he lived within the district. It is clear that the registrar has misconstrued the rule, and, therefore, the case raises a question of jurisdiction which this Court can deal with by way of prohibition.

Appeal allowed.

Solicitors for plaintiff: *Chester & Co., for Greenhalgh, Bolton.*

Solicitors for defendant: *Waterhouse & Co., for Mayer & Nelson, Burslem.*

F. O. R.

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July 24.

MOUSELL BROTHERS, LIMITED *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Railway Company—Rates and Tolls—False Account of Goods—Intent to avoid Payment—Criminal Law—Mens rea—"Person"—Corporation—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 98, 99—*Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 2.

By s. 98 of the Railways Clauses Consolidation Act, 1845, every person being the owner or having the care of any carriage or goods passing or being upon a railway shall, on demand, give to the collector of tolls an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage; and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls.

By s. 99, if any such owner or other such person fail to give such account, or if he give a false account, with intent to avoid the payment of any tolls payable in respect of the goods, he shall be liable to a penalty:—

Held, that owners of goods may, without a mens rea, be guilty of giving a false account with intent to avoid payment of tolls, and that if their manager actually gives the false account with intent to avoid the payment the owners, though a limited company, are liable.

CASE stated by a magistrate.

1. On December 14, 1916, two complaints were preferred by

Humphrey Mansfield Dyke on behalf of the London and North-Western Railway Company, hereinafter called the respondents, under the Railways Clauses Consolidation Act, 1845 (1), against Mousell Brothers, Limited, hereinafter called the appellants, for that they on November 7 and 8, 1916, being the owners or having the care of certain goods passing upon and being upon the London and North-Western Railway, did on demand unlawfully give to the collector of tolls for the respondents a false account of the same with intent to avoid payment of the tolls payable in respect thereof.

The complaints were heard by the magistrate at Manchester on January 3, 1917, and the appellants were convicted and fined.

2. At the request of the appellants the following case was stated.

3. (*a*) The appellants were removal and storage contractors, having their principal place of business in London and having a branch at Manchester which was managed by Percy Charles Foss.

(*b*) On November 7, 1916, a man employed at the appellants' Manchester branch brought to the respondents' depot at London Road goods station, Manchester, two lorry loads of goods described by a witness for the respondents as " rough duff proper to be put in

(1) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 98: " Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls, at the places where he attends for the purpose of receiving goods or of collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to be unloaded or taken off the railway; and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls."

Sect. 99: " If any such owner or other such person fail to give such account, or to produce his way-bill or bill of lading, to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload . . . . any part of his . . . . goods at any other place than shall be mentioned in such account with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company a sum not exceeding ten pounds for every ton of goods, or for any parcel not exceeding one hundredweight . . . ."

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open trucks" for carriage over the respondents' railway to London and handed to a servant of the respondents a consignment note dated November 7, 1916, which had been made out by one William Day in the employment of the appellants' Manchester branch. In this consignment note the goods were described as "iron safe, old timber, and iron rods."

(*c*) By virtue of the Railway and Canal Traffic Act, 1888, and the London and North-Western Railway (Rates and Charges) Order Confirmation Act, 1891, goods to be carried by the respondents upon their railway were classified under eight classes known respectively as classes A, B, C, 1, 2, 3, 4, and 5, and the respondents were empowered to charge, and did charge, for goods carried upon their railway different tolls, as the appellants knew, according to the particular class under which the goods were classified, the charges for goods in class A being the lowest and those for goods in class 5 the highest. Iron safes were classified as class 2; old timber and iron rods as class C.

(*d*) The goods so brought as aforesaid to the respondents' depot consisted of various goods which were classified under classes 5, 3, 2, 1, and C, including an iron safe and several pieces of old timber.

(*e*) The goods were loaded by men employed at the appellants' Manchester branch into an open truck belonging to the respondents in the presence of two employees of the respondents who had not then seen the consignment note.

(*f*) On November 8, 1916, a man employed at the appellants' Manchester branch brought another lorry load of goods to the respondents' depot to be carried by the respondents over their railway to London and handed to a servant of the respondents a consignment note dated November 8, 1916, which had also been made out by William Day. In this consignment note the goods were described as "old timber and iron rods."

(*g*) The goods brought on November 8, 1916, to the respondents' depot consisted of goods classified under classes 5, 4, 3, and C.

(*h*) The second lorry load of goods were also loaded by men employed at the appellants' Manchester branch into an open truck belonging to the respondents.

(*i*) On December 6, 1916, the appellants' manager at the Manchester branch, the said Percy Charles Foss, said to a representative

of the respondents that he was responsible as manager for the two consignment notes and that the goods to which they referred could not properly be described as old timber or iron rods.

(*j*) William Day was called as a witness for the respondents, and said that shortly after entering the service of the appellants at their Manchester branch Percy Charles Foss had shown him how to make out consignment notes from classes named to him by Percy Charles Foss, one of such classes being "iron rods and old timber."

(*k*) Difficulties have arisen from time to time between the railway company and consignors, and the differences in tolls arising from mis-declaration have been adjusted if it was considered that the mistake in classification had been not unreasonably made.

(*l*) On July 10, 1916, Percy Charles Foss had undertaken to a representative of the railway company that he would thereafter correctly describe goods to be consigned by the appellants over the respondents' railway, having previously wrongly described goods in consignment notes handed to the respondents.

(*m*) The respondents had published all the necessary notices and done all things which they were required to do before they were entitled to charge the tolls applicable to the several classifications aforesaid, and had also published all the necessary notices and done all things they were required to do with reference to the publication of the short particulars of the several offences for which any penalty is imposed by the Railways Clauses Consolidation Act, 1845.

(*n*) The tolls chargeable according to the description of the goods on the consignment notes were, for the goods consigned on November 7 2*l.* 16*s.* 8*d.* and for those consigned on November 8 1*l.* 17*d.* 1*d.* The tolls chargeable had the goods been correctly described were for those consigned on November 7 4*l.* 9*s.* 2*d.* and for those consigned on November 8 2*l.* 18*s.* 6*d.*

(*o*) The appellants were the owners of the goods brought as aforesaid to the respondents' station at London Road, Manchester. That station was the place where the consignment notes were handed by the appellants to the respondents' collector of tolls and where the collector of tolls attends for the purpose of collecting tolls for the part of the respondents' railway on which the goods were about to travel.

(*p*) No express demand was made by the respondents' servants

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for an account of the goods, but by the course of business known to the appellants the goods would not have been received by the respondents if consignment notes had not been delivered.

4. Counsel for the respondents contended that on the above facts the appellants should be convicted under ss. 98 and 99 of the Railways Clauses Consolidation Act, 1845.

5. Counsel for the appellants contended (*a*) that it was a constituent element of the offence charged in the said complaints that there should be an intention to defraud the respondents; (*b*) that the said William Day was not the agent of the appellants to defraud the respondents; (*c*) that there was no evidence of any intention on the part of the appellants to defraud the respondents.

6. The magistrate was of opinion that the goods brought by the appellants to the respondents' station on November 7 and 8, 1916, were not correctly described in the consignment notes, nor were the respective numbers or quantities of the goods liable to the payment of different tolls correctly specified in the consignment notes; that the incorrect description and specification were so made on the said consignment notes on the instructions of Percy Charles Foss in order to avoid the payment of the proper tolls chargeable thereon; that Percy Charles Foss had authority from the appellants to give the said instructions, and that the appellants were liable under the statute for the act of Percy Charles Foss, and therefore were guilty of the offences charged in the said complaints.

7. The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

Cyril Atkinson, K.C., and *McCleary*, for the appellants. A master is not to be made criminally liable for the act of his servant: *Roberts* v. *Woodward* (1); *Massey* v. *Morriss*. (2) Prima facie mens rea is an essential element in a criminal offence: *Sherras* v. *De Rutzen* (3); *Pearks, Gunston & Tee* v. *Ward*. (4) An Act of Parliament may, no doubt, impose liability though there be no mens rea: see the cases cited by Wright J. in *Sherras* v. *De Rutzen* (3), *Cundy* v. *Le*

(1) (1890) 25 Q. B. D. 412.
(2) [1894] 2 Q. B. 412.
(3) [1895] 1 Q. B. 918.
(4) [1902] 2 K. B. 1.

Cocq (1), and *Coppen* v. *Moore* (*No.* 2). (2) But that has not been done in the present case.

[They were stopped.]

Disturnal, K.C., and *Wingate-Saul*, for the respondents. By s. 2 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), "person," unless the contrary intention appears, includes a body corporate. No contrary intention appears in s. 99 of the Railways Clauses Consolidation Act, 1845, because a large number of persons being the owners of goods passing or being upon a railway are bodies corporate. The penalty, a mere fine, shows no intention of excluding corporations, as it did in *Hawke* v. *Hulton & Co.* (3) It follows that a body corporate giving a false account with intent to avoid payment of tolls is liable to a penalty. A body corporate can only act through its officers and servants. The act and intention of its officer are the act and intention of the corporation. A company has been held liable to a penalty for giving a false warranty under the Sale of Food and Drugs Act, 1899, where the servants of the company had no reason to believe that the warranty was true: *Chuter* v. *Freeth & Pocock*. (4) This is not a question of the master being liable for the criminal act of his servant, but of the liability of a corporation, which can only be liable for the act of its officer in the scope of his employment. There is no doubt that the man Foss was acting in the scope of his authority in giving the consignment note. If so the appellants are liable.

[ATKIN J. referred to *Citizens' Life Assurance Co.* v. *Brown*. (5)]

If this is a case of the liability of a master for the act of his servant, the appellants are still liable. The duty of giving a true account is an absolute duty, and a master is liable if his servant commits the act.

Cyril Atkinson, K.C., replied.

VISCOUNT READING C.J. In this case Foss, whose duty it was as manager to fill up or direct the filling up of the consignment notes from his principals, the appellants, to the respondents, wrongly described the goods with intent to avoid the payment of the rate

(1) (1884) 13 Q. B. D. 207.
(2) [1898] 2 Q. B. 306.
(3) [1909] 2 K. B. 93.
(4) [1911] 2 K. B. 832.
(5) [1904] A. C. 423.

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payable in respect of the right classification of the goods. The question of law is whether the appellants, a limited liability company, can be convicted for this offence. It was not suggested that the directors of the appellant company were themselves parties to this false description. But it is suggested that they can be made criminally responsible for the act of their servant entrusted with the performance of this class of acts, and therefore acting within the scope of his employment. The magistrate convicted the appellants and stated a case for this Court.

Mr. Atkinson has argued that this conviction must be quashed, because a principal cannot be made liable for the act of his servant or agent unless the principal has given instructions for the wrongful act, or, having knowledge of it, has allowed his agent to continue to do the act, or unless there are in the statute creating the offence very clear words—clearer than the words of this Act—imposing responsibility upon him for acts of his servant or agent. The question we have to determine is whether that contention is right.

The first thing to consider is the language of the statute. Sect. 98 imposes upon every person being the owner or having the care of goods the obligation to give an exact account in writing of the number or quantity of goods liable to each of the tolls. Then by s. 99: "If any such owner or other such person fail to give such account, or to produce his way-bill or bill of lading to such . . . . servant of the company demanding the same"—then comes these important words—"or if he give a false account . . . . with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company a sum not exceeding ten pounds for every ton of goods, ... and such penalty shall be in addition to the toll to which such goods may be liable." By s. 2 of the Interpretation Act, 1899, it is provided that "In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate." In order to determine whether or not the contrary intention does appear, we must consider the broad question under what circumstances can a principal be made criminally responsible for the act of his servant. And then the narrower

question, does this section, which imposes the penalty upon the owner, make the principal liable for the act of his servant done within the scope of his employment, but without the knowledge or the instructions of the principal?

The true principle of law is laid down in the case of *Pearks, Gunston & Tee* v. *Ward*. (1) The passage to which I particularly wish to refer is in the judgment of Channell J.: "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of mens rea, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine." And then the learned judge goes on to point out why the Legislature has thought right to do that, and he says if the Legislature has so enacted, the offender is liable to a penalty whether he had mens rea or not, whether he intended to commit a breach of the law or not. It follows that where the act forbidden is one of the character described by Channell J. the principal is liable for the doing of the forbidden act by his servant; and the question before us is whether the acts forbidden by s. 99 are such that if done by a servant or agent the principal is so made liable. Before dealing with the exact language of the section I should like to refer to *Coppen* v. *Moore* (*No.* 2) (2), a case which, though not directly applicable to the present, yet contains a statement by Lord Russell C.J. of some general principles which I think may well be quoted. Referring to *Bond* v. *Evans* (3) the Chief Justice said: "The Court in fact came to the conclusion that, having regard to the language, scope, and object of those Acts,"—i.e., the Licensing Acts—"the Legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorized by the master." After holding that the magistrates in that case came to a correct conclusion, he adds (4): "When the

(1) [1902] 2 K. B. 1, 11.
(2) [1898] 2 Q. B. 306, 312.
(3) (1888) 21 Q. B. D. 249.
(4) [1898] 2 Q. B. 314.

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scope and object of the Act are borne in mind, any other conclusion would to a large extent render the Act ineffective for its avowed purposes." So that, where the language of an Act is not so plain as to leave no room for doubt, the Court may bear in mind the avowed purpose of the Act and consider whether a particular construction will render the Act effective or ineffective for that purpose.

Prima facie, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Acts there are again instances well known in these Courts where the master is made responsible, even though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the Legislature absolutely forbids the act and makes the principal liable without a mens rea.

There are again, cases, of which *Chuter* v. *Freeth & Pocock* (1) is an example, in which there must be something in the nature of mens rea. The offence in that case consisted in giving to a purchaser of food a false warranty in writing. The principals were a limited liability company. The magistrate had held that a limited liability company could not be made liable for such an offence. This Court upset the decision. As Lord Alverstone C.J. indicated, the question really depended upon the principles laid down in the case of *Pearks, Gunston & Tee* v. *Ward.* (2) It is true that in *Chuter* v. *Freeth & Pocock* (1) the respondents were not represented. The offence for which this Court held them liable was of giving a false warranty, that is to say, one which they had not proved they had reason to believe was a truthful one. It is another of those cases in which the principals have been held liable for the acts of their servants or agents.

(1) [1911] 2 K. B. 832. (2) [1902] 2 K. B. 1.

Coming now to the present case, in my view the Legislature must be taken to have known that the forbidden acts were of a kind which, even in the year 1845, would in most cases be done by servants; and yet the penalty is imposed upon "every person being the owner or having the care of any carriage or goods passing or being upon the railway." It may be that the words "person having the care of any carriage or goods," &c., are wide enough to cover a person who occupied the position of Foss. I am by no means convinced of it. I am inclined to think they mean the bailee who is entrusted with the goods for carriage and who is not the owner. They would clearly not include a servant merely entrusted with the duty of filling up a consignment note. But the forbidden acts are such as would be performed by a servant. The object of the statute was, in my opinion, to forbid the giving of a false description of goods carried by the railway and so protect the railway company from being cheated into carrying goods at less than the due rate. I think, looking at the language and the purpose of this Act, that the Legislature intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment. If that is the true view, there is nothing to distinguish a limited company from any other principal, and the defendants are properly made liable for the acts of Foss. The magistrate was right and this appeal fails.

RIDLEY J. I agree with the judgment of my Lord.

ATKIN J. I agree, but I should like to add a few words in view of the argument of Mr. Atkinson. I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.

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MOUSELL BROTHERS v. LONDON AND NORTH-WESTERN RAILWAY.

Atkin J.

If authority for this is necessary it will be found in the judgment of Bowen L.J. in *Reg.* v. *Tyler.* (1) Now in this case the duty is imposed upon "every person being the owner or having the care of any goods" to "give to the collector of tolls . . . . an exact account." I share with my Lord the doubt as to whether "the person having the care of the goods" does not mean a bailee who is entrusted by the true owner of the goods with the care of them for the purpose of himself contracting with the railway company, and I think that view is supported by a consideration of s. 101, and especially the provision as to disputes therein mentioned. But the duty which is imposed upon an owner or a person having care of the carriage or goods was a duty which even in 1845 would ordinarily be performed by a servant of the owner or the person having care. The account would in those days, as it certainly would in these days, be prepared by some clerk, servant, or manager. When a penalty is imposed for the breach of the duty, it is reasonable to infer that the penalty is imposed for a default of the person by whom the duty would ordinarily be performed. If the servant is to prepare the account, then it is the fault of the servant in not preparing the account that makes the owner liable to the penalty. This is borne out by s. 99, which imposes the penalty for breach of the duties imposed by s. 98—namely, for failure to give the account or for giving a false account. It is true it proceeds to provide a penalty for other offences, such as unloading and withholding a way-bill or bill of lading. I see no difficulty in the fact that an intent to avoid payment is necessary to constitute the offence. That is an intent which the servant might well have, inasmuch as he is the person who has to deal with the particular matter. The penalty is imposed upon the owner for the act of the servant if the servant commits the default provided for in the statute in the state of mind provided for by the statute. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No mens rea being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation.

(1) [1891] 2 Q. B. 588, 592.

I think, therefore, that the magistrate came to a right conclusion and that this appeal should be dismissed.

Appeal dismissed.

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MOUSELL BROTHERS v. LONDON AND NORTH-WESTERN RAILWAY.

Solicitors for appellants: *Grundy, Kershaw, Samson & Co., Manchester.*

Solicitor for respondents: *M. C. Tait.*

W. H. G.

THE KING *v.* GOVERNOR OF WORMWOOD SCRUBBS PRISON.

1917
Sept. 20.

Ex parte RILEY.

Army—Effect of Discharge on Ground that "services no longer required"—Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *Sched. I., clause* 5—*Military Service Act*, 1916 (*Session* 2) (6 & 7 *Geo.* 5, *c.* 15), *s.* 1; *s.* 3, *sub-s.* 1; *s.* 17, *sub-s.* 2.

A man who has been discharged from the military service of the Crown in consequence of his services being no longer required is still deemed as from the appointed date applicable to him (i.e., the thirtieth day after the date of his discharge) to have been enlisted and transferred to the reserve under s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2).

So *held* by Darling and Avory JJ. (Bailhache J. dissenting).

Per Avory J.: Under the Military Service Act, 1916 (Session 2), there may be more than one appointed date for the same man.

RULE NISI obtained at the instance of the applicant, Riley, calling upon the respondent, the governor of His Majesty's prison at Wormwood Scrubbs, to show cause why a writ of habeas corpus should not issue to have the body of the applicant immediately before this Court on the ground that the applicant was not, at the date of a sentence of a court-martial under which he was imprisoned amenable to military discipline within the jurisdiction of the court-martial.

The applicant before the passing of the Military Service Act, 1916, was a Territorial, and on the expiration of his service had been discharged. When the Act came into operation he was exempt under clause 5 of the exceptions contained in the First Schedule to

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the Act. Apparently he was unaware of his exemption, and in February, 1916, he applied for exemption on conscientious grounds, but the application was refused. By the Military Service Act, 1916 (Session 2), s. 3, sub-s. 1, and s. 17, sub-s. 2, so much of clause 5 of the exceptions in the First Schedule to the Military Service Act, 1916, as conferred exemption on men who had been discharged on the termination of their period of service was repealed, and the applicant thereupon became liable to be called up. He appealed again on conscientious grounds, but the tribunal, as he had been heard once, refused to hear him a second time. He did not appeal, was called up, refused to obey orders, and was convicted by a court-martial and sentenced to imprisonment. The member of Parliament for East Islington then approached the Secretary of State for War and made a point of the refusal of the tribunal to hear the applicant. In the result the Army Council on August 23, 1916, discharged him under clause 25 of the table contained in par. 329 of the King's Regulations, the cause of his discharge being specified as "His services being no longer required." The discharge was unconditional on the face of it, but the intention of the Army Council was to enable him to renew his application for exemption to the tribunal. It did not appear that any intimation of the object of the discharge was given to the applicant, and he alleged that, so far from the object being communicated to him, he was told by the officer who handed him the certificate of discharge that he was "absolutely free from the Army now." He did not renew his application, but on December 12, 1916, went to France with the Friends' War Victims Relief Committee. He returned to England on June 8, 1917, and on June 28 was arrested as an absentee and taken before a magistrate, who on June 29 ordered him to be handed over to the military authorities. On July 17, 1917, he was charged before a court-martial with disobeying in such manner as to show a wilful defiance of authority a lawful command given personally by his superior officer in the execution of his office and was convicted and sentenced to imprisonment. He was committed to Wormwood Scrubbs Prison to serve his sentence, and thereupon obtained the rule.

By the Military Service Act, 1916 (Session 2) (6 & 7 Geo. 5, c. 15), s. 1, sub-s. 1: "Every male British subject who has at any time since the fourteenth day of August nineteen hundred and fifteen

been, or for the time being is, ordinarily resident in Great Britain, and who for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916 (in this Act referred to as the principal Act), as amended by this Act or any subsequent enactment, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in his Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve :

. . . . . .

" The appointed date shall, as respects men who come within the operation of this section on the passing of this Act, be the thirtieth day after the date of the passing of this Act, and, as respects men who come within the operation of this section after the passing of this Act, be the thirtieth day after the date on which they so come within the operation of this section."

Par. 5 of the exceptions set out in the First Schedule to the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), was originally in the terms : " Men who have left or been discharged from the naval or military service of the Crown in consequence of disablement or ill health (including officers who have ceased to hold a commission in consequence of disablement or ill health), and, subject to any provision which may hereafter be made by Parliament, men who have been discharged from the naval or military service of the Crown on the termination of their period of service."

By s. 3, sub-s. 1, of the Military Service Act, 1916 (Session 2) : " Paragraph five of the First Schedule to the principal Act shall cease to have effect so far as it relates to men who have been discharged from the naval or military service of the Crown on the termination of their period of service : Provided that where a man is transferred to the reserve in pursuance of the principal Act, or this Act, he shall, if he has been so discharged from the military service of the Crown as a warrant officer or non-commissioned officer, be restored to the military rank which he held immediately before the termination of his military service " ; and by s. 17, sub-s. 2, and the schedule to the Act the words " and subject to any provision

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which may hereafter be made by Parliament, men who have been discharged from the naval or military service of the Crown on the termination of their period of service " in par. 5 of the First Schedule to the principal Act are repealed.

Branson, for the respondent, showed cause. Under the Military Service Acts, 1916, discharge from military service, except for disablement or ill-health, forms no ground for release from military service. As the applicant's discharge was not for disablement or ill-health, he was not within any of the exceptions in the First Schedule to the Military Service Act, 1916. Immediately he obtained his discharge on August 23, 1916, he again came under the operation of the statutes and was transferred to the reserve, for he was within the age limits and was not within any of the exceptions.

A. Powell, *K.C.*, and *Hawkin*, in support of the rule. No notice was given to the applicant of the reason for his discharge. On the passing of the Military Service Act, 1916 (Session 2), so much of clause 5 of the exceptions in the First Schedule to the Military Service Act, 1916, as related to time-expired men was repealed, and the applicant thereupon became subject to the Military Service Acts, 1916, and therefore on June 24, 1916, the thirtieth day after the passing of the Military Service Act, 1916 (Session 2), his appointed date had arrived and he was deemed to have been enlisted and transferred to the reserve. He came within the words " The appointed date shall, as respects men who come within the operation of this section on the passing of this Act, be the thirtieth day after the date of the passing of this Act," in s. 1, sub-s. 1, of the Act of 1916 (Session 2), and was therefore not within the words " and, as respects men who come within the operation of this section after the passing of this Act, be the thirtieth day after the date on which they so come within the operation of this section " which follow, as they only apply to men who are not within the former words. The effect of the discharge of August 23, 1916, was that he was no longer in the Army and there were no circumstances which brought him back into it. His appointed date came into operation and was exhausted on the thirtieth day after the passing of the Act of 1916 (Session 2), i.e., June 24, 1916. Therefore he could not have another appointed date after August 23, 1916, because the words

" and, as respects men who come within the operation of this section after the passing of this Act, be the thirtieth day after the date on which they so come within the operation of this section " in s. 1, sub-s. 1, of the Act of 1916 (Session 2) did not apply to him. A man cannot have two appointed dates. [The Army Act, 1881 (44 & 45 Vict. c. 58), s. 92, and *Fraser* v. *Military Authorities* (1) were also referred to.]

BAILHACHE J. I regret to say that there is a difference of opinion between my brothers and myself, and it falls upon me to give my judgment first.

The questions are whether the applicant has been rightly ordered to be handed over to the military authorities as an absentee and has been rightly convicted by court-martial of insubordination after being called to the colours. Both these questions depend upon the same point, namely, whether he was a man liable to military service when he was on June 29, 1917, ordered by the magistrate to be handed over to the military authorities. [The learned judge having stated the facts, continued :]

It is said, no doubt truly, on behalf of the military authorities that the object of his discharge was to enable him to make a second or third application to the tribunal for exemption from military service upon the ground that he was a conscientious objector, but he denies that any intimation was given to him of the object of his discharge, and Mr. Branson, on behalf of the respondent, has not been able to satisfy us that the object of that discharge was in fact communicated to the applicant, who says that, so far from it being communicated to him, he was told by the officer who handed him the certificate of discharge that he was " absolutely free from the Army now." The case, therefore, is that of a man who became liable to military service on the appointed date, namely, thirty days after the Military Service Act, 1916 (Session 2), came into operation, and who, by virtue of that Act, was called up for service, and, having served for a short period, obtained a certificate of complete discharge ; and there is no dispute that the effect of that certificate was that he ceased to be a member of the Army or subject to the Military Service Acts—at any rate, for a period of thirty days.

(1) [1917] W. N. 147 ; 116 L. T. 447.

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Bailhache J.

On behalf of the respondent it is contended that at the expiration of that period of thirty days the applicant must be deemed to have been enlisted and transferred to the reserve and therefore again liable to a notice calling him up for service, because he was then a man who for the time being was between eighteen and forty-one years of age, was ordinarily resident in the United Kingdom, and as there was no statutory exception upon which he could rely he automatically came a second time within the operation of the Military Service Act, 1916 (Session 2).

In my judgment that contention is not sound. I think that the effect of the Act of 1916 (Session 2) is that there comes a time to every man between the age of eighteen and forty-one, a British subject ordinarily resident in Great Britain, when he prima facie comes within the operation of the Act of 1916, namely, on the appointed date. If at that time he comes within the Act and has no exception in his favour, then he is liable to military service; he is, in the words of the Act, "deemed to . . . . have been duly enlisted . . . . and to have been forthwith transferred to the reserve." If after that has happened he is called to the colours, serves, and is then discharged, it seems to me that the Act has had its full effect upon that particular individual. The appointed date has arrived; he has been liable to service, has been called up for service, has served, and has been discharged; and in my judgment a second appointed date cannot arrive in the case of that man or any other man whose appointed date has once arrived and who has either served his time or been discharged for some reason which to the Army authorities seems sufficient.

Shortly expressed, my view is that there comes to all men to whom the Act of 1916 (Session 2) applies one appointed date and one only. When that appointed date and service under it and discharge from service has exhausted his liability, he has no second appointed date.

AVORY J. With all respect to my brother Bailhache and to the judgment he has delivered, I have come to a contrary conclusion.

The question is whether the applicant is a man who has within the meaning of s. 1 of the Military Service Act, 1916 (Session 2), "come within the operation of this section after the passing of this Act." If he has, then the thirtieth day after the date on which he so came

within the operation of the section was the appointed date upon which he was deemed to have been duly enlisted and to have been forthwith transferred to the reserve. It is clear that by the Act of 1916 (Session 2) it was contemplated that a man discharged from the Army might be re-enlisted and transferred to the reserve, because s. 3, sub-s. 1, expressly repealed so much of par. 5 of the exceptions set forth in the First Schedule to the Military Service Act, 1916, as related to men who had been discharged from the naval or military service of the Crown on the termination of their period of service. Using affirmative instead of negative language, the effect is that a man who has been discharged from the military service of the Crown on the termination of his period of service becomes subject to the operation of the Military Service Act, 1916 (Session 2), and is deemed from the appointed date applicable to him to have been re-enlisted and to have been forthwith transferred to the reserve. The result is that the mere fact that a man has been discharged from the Army cannot operate to prevent him coming within the terms of the Act of 1916 (Session 2), and if that is so I can see nothing in the present case to prevent the applicant, when he was discharged, coming within the operation of the Act.

Further, *Fraser* v. *Military Authorities* (1) is in my opinion a direct authority in support of the view I have expressed, for it was decided in that case that an officer (who while he was an officer in the Army clearly did not come within the terms of the Military Service Act, 1916 (Session 2)), upon resigning his commission and ceasing to be an officer and a soldier, thereupon, by the effect of the Act, became re-enlisted as a private and transferred to the reserve. I see no distinction in principle between that case and the present one.

It does not appear to me that the present case involves the question whether there can be more than one appointed date for the same man, but if it is necessary for me to differ from my brother Bailhache upon that point I do so, and am prepared to hold that a man may under some circumstances have two appointed dates. The question is whether the applicant on his discharge became transferred to the reserve under the provisions of the Military Service Act, 1916 (Session 2). In my judgment he did become so

(1) [1917] W. N. 147; 116 L. T. 447.

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transferred, and therefore the order of the magistrate handing him over to the military authorities was right and the court-martial had jurisdiction to pass sentence upon him. It follows that he is in lawful custody and that the rule should be discharged.

DARLING J. It remains for me to say that I agree with the judgment which has been delivered by my brother Avory.

It is admitted by Mr. Powell that on the passing of the Military Service Act, 1916 (Session 2), the applicant was subject to it and that he then became a soldier. [Having reviewed the facts the learned judge continued:] The applicant alleges that he did not know the reason for which the certificate of discharge was given to him. That may be so. After he received that certificate he did not, in my judgment, become a person who could never again be subject to the Military Service Act, 1916 (Session 2). He, being a male British subject ordinarily resident in Great Britain over eighteen years of age and under forty-one, is, in my judgment, subject to the Act. There were thirty days after he received the discharge during which he could not be called up. If he had made an application for exemption, as he might have done, to a tribunal and had satisfied it that he was a conscientious objector, he could not have been called up again. I am personally sorry to have to give this judgment, because I am perfectly satisfied that the applicant is of no earthly use to the Army, and that it will only be a useless expense to keep him there, and if I could agree with my brother Bailhache I would do so; but the arguments against the applicant are too strong, and are greatly fortified by *Fraser's Case* (1) and by the words of the statute itself, which show that although a man has been in the Army and has subsequently come out of it he may still, by virtue of the Act, re-enter it.

The rule must therefore be discharged; but, as there is a difference of opinion amongst the members of the Court, without costs.

Rule discharged.

Solicitors for applicant: *Kenneth Brown, Baker & Baker.*
Solicitor for respondent: *Treasury Solicitor.*

(1) [1917] W. N. 147; 116 L. T. 447.

J. E. A.

[COURT OF CRIMINAL APPEAL.]

1917
Oct. 15.

THE KING *v.* WILLIAM DAVIS.

Criminal Law—Habitual Criminal—Evidence—Previous Conviction as Habitual Criminal—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-s.* 2 (*b*).

Where a person who has been found to be a habitual criminal and has been sentenced to preventive detention subsequently commits another crime, he may, by virtue of s. 10, sub-s. 2 (*b*), of the Prevention of Crime Act, 1908, be again convicted as a habitual criminal, on proof being given of the previous conviction as a habitual criminal, without proving also that since the date of that conviction he has been leading persistently a dishonest or criminal life.

APPEAL against sentence as a habitual criminal at the London Sessions.

The prisoner, who pleaded guilty to an indictment for housebreaking, was also charged with being a habitual criminal, the ground for so charging him being thus stated in the notice served upon him: "That on November 7, 1911, you were at the Central Criminal Court convicted of a crime within the meaning of s. 10 of the Prevention of Crime Act, 1908 (1), and that on such conviction you were found by the jury to be a habitual criminal, and were then sentenced to five years' preventive detention." This conviction being proved, the jury found the prisoner guilty, the chairman upholding the contention for the prosecution that where a man who has once been convicted as a habitual criminal is subsequently convicted of another crime he can again be convicted as a habitual criminal, on proof being given of the previous conviction as a habitual criminal, and without evidence being given that since the date of that conviction he has been leading persistently a dis-

(1) Prevention of Crime Act, 1908, s. 10, sub-s. 2: "A person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime . . . . and that he is leading persistently a dishonest or criminal life; or (*b*) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention."

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honest or criminal life. The chairman added that if leave to appeal had been necessary he would have given it, so that the point could be considered by the Court of Criminal Appeal.

Bryan, for the appellant. In the absence of evidence that a person is leading persistently a dishonest or criminal life he cannot be convicted as a habitual criminal under either clause (*a*) or (*b*) of s. 10, sub-s. 2. It is not sufficient to prove a previous conviction as a habitual criminal, for since the date of that conviction he may have been living honestly for some years.

[DARLING J. This point was decided against your contention by this Court on September 21, 1916, in *Rex* v. *Collins*. (1)]

W. A. Attenborough, for the prosecution, was not called upon.

The following judgment of the COURT (Darling, Avory, and Sankey JJ.) was delivered by

SANKEY J. The only evidence given to show that the appellant was a habitual criminal was proof of the conviction of November 7, 1911, when he was sentenced to five years' preventive detention. It is said on his behalf that that was not sufficient because it was not proved that he was in fact leading persistently a dishonest or criminal life. To see whether that contention is sound or not we must examine the provisions of s. 10 of the Prevention of Crime Act, 1908. That section prescribes two ways in which the prosecution may prove that a man is a habitual criminal; first, it may be shown that since attaining the age of sixteen years he has at least three times previously to the crime charged in the indictment been convicted of a crime and that he is leading persistently a dishonest or criminal life; secondly, it may be shown that he has previously been found to be a habitual criminal and been sentenced to preventive detention. If the prosecution proceeds in this latter way the section does not say that the accused must be proved to have been leading persistently a dishonest or criminal life, and in our opinion it is sufficient to prove that he has been previously found to be a habitual criminal and been sentenced to preventive detention without also proving that he has been leading persistently a dishonest or criminal life. In some cases it may well be that this construc-

(1) Unreported.

1917

REX v. DAVIS.

tion works hardship, because, since his previous conviction, the accused may have for a long time been leading a perfectly honest life; but that consideration is a matter for the Legislature and not for this Court. The appeal will be dismissed.

This point was decided in the same way by a Court consisting of the Lord Chief Justice and Darling and Bray JJ. in *Rex* v. *Collins* on September 21, 1916, but the case does not appear to have been reported.

Appeal dismissed.

Solicitor for appellant: *F. Wildey Wright.*

Solicitor for prosecution: *Director of Public Prosecutions.*

J. S. H.

1917

Oct. 18.

COLBOURNE, APPELLANT *v.* LAWRENCE, RESPONDENT.

Merchant Shipping—Seaman—Desertion—Failure of Master to enter in Log Statement of Wages due to Seaman "left behind"—Merchant Shipping Act, 1906 (6 *Edw.* 7, *c.* 48), *s.* 28.

Sect. 28, sub-s. 1, of the Merchant Shipping Act, 1906, provides that "if a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall . . . . as soon as may be, enter in the official log-book a statement of the effects left on board by the seaman and of the amount due to the seaman on account of wages at the time when he was left behind":—

Held, that the words "left behind" apply not only to the case of a seaman who has actually been left behind in the port when his ship sails therefrom, but also to the case of a seaman who has deserted from the ship and as to whom, when the ship sails from the port, the master has no information whether he is in fact left there or has already joined, and sailed from the port in, another ship.

CASE stated by Bristol justices.

The respondent, the master of the British sailing ship *Invermay*, was charged on nine summonses for unlawfully failing to enter in the ship's official log-book a statement of the amount due to nine seamen left behind out of the British Islands, as required by s. 28 of the Merchant Shipping Act, 1906 (1).

(1) Merchant Shipping Act, 1906, s. 28, sub-s. 1: "If a seaman belonging to any British ship is left behind out of the British

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By articles of agreement opened at Dublin on February 5, 1915, for the voyage which commenced at that port on February 12 the nine seamen in question were engaged (amongst others) as members of the crew of the *Invermay* for a voyage not exceeding three years' duration to any ports or places within certain limits and to end at such port in the United Kingdom or Continent of Europe as might be required by the master. The nine seamen deserted, one at New York on May 25, 1915, two at Newcastle, New South Wales, on November 14, 1915, and the others at Melbourne on various dates in October, 1915, and none of them rejoined the ship, which arrived at Bristol on August 19, 1916. The official log contained an entry recording the desertion of each of the nine seamen, and it was proved that they were in fact deserters and took away all their effects when deserting the ship; but the official log contained no statement of the amount due to any of those seamen on account of wages at the time they deserted. The respondent's seaman's wages account-book, however, contained particulars of the amounts due to seven of the men and the amounts overpaid to the other two. There had previously been cases in the port of Bristol in which shipmasters had not made such entries in the official log, but no proceedings had been taken hitherto.

Islands, the master of the ship shall subject to the provisions of this section—

"(*a*) as soon as may be, enter in the official log-book a statement of the effects left on board by the seaman and of the amount due to the seaman on account of wages at the time when he was left behind; and

"(*b*) on the termination of the voyage during which the seaman was left behind, furnish to the proper officer within forty-eight hours after the arrival of the ship at the port at which the voyage terminates, accounts in a form approved by the Board of Trade, one . . . . of the effects and wages, and the other . . . . of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion, neglect to join his ship, or any other conduct constituting an offence under section two hundred and twenty-one of the [Merchant Shipping Act, 1894] . . . ."

Sub-s. 10: "If the master of a ship fails without reasonable cause to comply with this section, he shall . . . . be liable on summary conviction to a fine not exceeding twenty pounds . . . ."

It was contended for the appellant that a seaman who deserts his ship at a port out of the British Islands and is not brought away from such port is a seaman "left behind" within s. 28 of the Merchant Shipping Act, 1906, and that the respondent's failure to make an entry in the official log-book of the wages due to each of the seamen constituted an offence.

It was contended for the respondent that the provisions of the Act being penal the language must be construed strictly, and that a deserting seaman who joined another vessel and left the port where the desertion took place whilst the vessel remained in that port could not be described as a seaman "left behind"; that there was no evidence that the seamen had been left behind; that it was not the custom or practice of shipmasters to treat deserters, who it was believed had deserted for the purpose of joining other ships, as men "left behind," and that the usual interpretation of those words in practice was that they applied to men unable to join in consequence of accident, illness, misadventure or the like, or to men punished for some offence and who remained in prison or under restraint.

Evidence was given in support of those points by the respondent and by two shipmasters, and it was proved that in each case the vessel had remained in port in some cases long after the men had deserted and in all cases several days after the desertion, and that the strong probability was that the men had deserted from the *Invermay* and had joined other vessels, gone to sea, and probably had either returned to England or were on their way there before the *Invermay* left the port where the desertion took place. The justices held that the section must be construed strictly, and they found as a fact that there was no evidence that the men had been left behind, but that there was every reason to believe that they had gone to sea in other vessels, leaving the *Invermay* behind in the port where they deserted. They also found that it was not the custom or practice for shipmasters to treat seamen who had deserted for the purpose of joining other vessels as men who had been left behind. The justices dismissed the summonses, but stated this case as to whether they were right in so doing.

Sir Gordon Hewart, S.-G., and *Branson*, for the appellant. A seaman who deserts from his ship in a foreign port is a seaman who

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is "left behind out of the British Islands" within s. 28, sub-s. 1 (*a*), of the Merchant Shipping Act, 1906, and the master of the ship is bound to make the entries in the official log required by that sub-section. Clause (*b*) of the sub-section clearly shows that a deserter is a person who is "left behind": see also *Deacon* v. *Quayle* (1), where it was pointed out that s. 28 of the Act of 1906 is machinery for carrying out the scheme enacted by ss. 221 and 232 of the Merchant Shipping Act, 1894. It is sought by the respondent to draw a distinction between the case of a deserter who is in fact left in a foreign port when the ship from which he has deserted sails and the case of a deserter who has joined another ship and sailed in her before the ship from which he has deserted leaves that port. No good reason can be suggested why the Legislature should make that distinction, which, if sound, would have the effect of rendering s. 28 to a great extent inoperative; but, furthermore, it is to be observed that there is no foundation for the suggestion that in this case the seamen left the different ports, where they deserted, in ships which sailed before the *Invermay*. The justices have shrunk from finding as a fact that the seamen left those ports in ships which sailed before the *Invermay*.

Inskip, K.C., and *A. T. Miller*, for the respondent. Sect. 28 is a penal section and must be construed strictly. Giving the words "left behind" their strict meaning, it is plain that they do not apply to the case of seamen who have sailed from the port before the vessel from which they have deserted leaves it. "Left behind" can only mean left in the port when their ship sails. It is for the prosecution to prove affirmatively that the seamen in question were "left behind" in the ports where they deserted from the *Invermay*, and this was not done. Clause (*b*) of s. 28, sub-s. 1, upon which reliance is placed for the appellant, does not assist his case. The section is perfectly workable by giving to the words "left behind" the meaning we contend for, namely, left behind in fact, which is the meaning they obviously bear in ss. 37 and 38 of the Act. It is to be observed that the group of sections to which s. 28 belongs is headed "Provisions as to Relief and Repatriation of distressed Seamen, and Seamen left behind Abroad." It cannot be said that a seaman who has deserted and has sailed in another ship requires

(1) [1912] 1 K. B. 445.

relief or repatriation, which is the object of those sections; s. 28 cannot, therefore, have been intended to apply to such a case as this.

DARLING J. This case turns entirely upon the meaning to be given to the words "left behind" in s. 28 of the Merchant Shipping Act, 1906. The seamen who in this case are said by the Solicitor-General to have been "left behind" were nine men who had deserted from the *Invermay* in a foreign port and left no effects on board. It may be, although it is absolutely uncertain, that they sailed from the ports where they deserted before the *Invermay* left; we have no information upon the point. The Solicitor-General contends that the fact that these men had deserted the ship and did not sail in her should have been entered in the official log-book. If s. 28, sub-s. 1, contained only clause (*a*) I should agree with Mr. Inskip that the ordinary meaning should be given to the words "left behind," and if the seamen had left the *Invermay* and gone ashore, and no one knew where they were or whether they had not sailed away in a ship before the *Invermay*, it would be impossible, in my opinion, to say that they had been "left behind." But s. 28 does not stop at clause (*a*), and if we examine clause (*b*) we find that it provides, inter alia, that if a seaman has deserted the master is bound to give an account of the fact on the termination of the voyage, "during which the seaman was left behind." I think it is clear from a consideration of the language of clause (*b*) that the Legislature intended the words "left behind" to cover not only the case of a seaman left on the shore when the ship actually sails away, but also the case of a deserter as to whom, by the mere fact of his desertion, it is impossible or difficult to know whether he is left on the shore or has sailed in another ship. No heavy burden is cast upon the master in requiring that he shall enter in the official log-book the fact that a seaman deserted at a certain port and left nothing on board. The appeal must be allowed, and the case remitted to the justices.

AVORY J. There is no finding of fact in this case, and there was no evidence to show, that these nine men had in fact joined other vessels and gone to sea before the *Invermay* left the ports where the various desertions occurred; so that there is no foundation in fact for the contention that the men had not been left behind. The case has, however, been stated, not for the purpose of getting a decision

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AVORY J.

upon that question of fact, but upon the assumption that the men had joined other vessels and had gone to sea before the *Invermay* left the ports. The question is whether on that assumption the men can properly be described as having been "left behind" out of the British Islands within the meaning of that expression in s. 28. The words "left behind out of the British Islands" are important. The justices have made the mistake which is not infrequently made by construing a particular word or clause in an Act of Parliament without having regard to the general tenor and object of the whole section or statute. It is quite true that, construing the words "left behind" by themselves, one would not generally speak of a man who is following another as leaving that other behind; but when it is observed that the whole object of s. 28 is that there shall be a record in the official log-book of all seamen who have been left behind out of the ship, it seems to me not only possible, but in the highest degree reasonable, to read the words as meaning that the master of a British ship as soon as may be after he leaves a port shall enter in the official log-book a statement of the effects, if any, left on board by, and the amount of wages due to, any seaman whom he has not brought away with him from the port; in other words, whom he has left behind. For that purpose it is immaterial whether the man is still standing on the quay or whether he may have been sent to prison, or whether he has in fact joined another ship. As was pointed out in *Deacon* v. *Quayle* (1), the whole purpose of s. 28 is to carry out the objects of ss. 221 and 232 of the Merchant Shipping Act, 1894, and when one looks at the purpose of those sections it supports the Solicitor-General's view that the words "left behind" include the case of a deserter whether he in fact remains in the port at the time his vessel sails therefrom or whether he has joined another ship and perhaps has sailed in it before the vessel from which he has deserted sails. I agree that the appeal succeeds.

SANKEY J. I agree.

Appeal allowed.

Solicitor for appellants: *Solicitor to Board of Trade.*

Solicitors for respondent: *Ford & Ford, for Wansbrough, Robinson, Tayler & Taylor, Bristol.*

(1) [1912] 1 K. B. 445.

J. S. H.

HURST, Appellant *v.* NOWLAN, Respondent.

1917
Oct. 18.

Poor Law—Maintenance and Control of Child—Resolution by Guardians—Assisting Child to leave Place where Child under Control—Necessity of proving Grounds for passing Resolution—Poor Law Act, 1899 (62 & 63 *Vict. c.* 37), *ss.* 1, 2.

In respect of two children who were being maintained by them, the guardians of a poor law union passed a resolution in the following terms: "That in pursuance of the authority vested in the guardians by the Poor Law Act, 1899, s. 1, the undermentioned children chargeable to this union be placed under the control of the guardians of the Eastbourne Union until the said children shall reach the age of eighteen years." In proceedings against a person under s. 2 of the Act for the offence of knowingly assisting one of the said children to leave, without the guardians' consent, the place where the child was under that control:—

Held, that it was not necessary for the prosecution to prove, in addition to the resolution itself, that one or other of the grounds mentioned in s. 1, sub-s. 1, of the Act existed which justified the guardians in passing the resolution.

Case stated by Eastbourne justices.

An information was preferred by Hurst against the respondent under the Poor Law Act, 1899 (1), for having, on February 6, 1917,

(1) Poor Law Act, 1899, s. 1, sub-s. 1: "Where a child is maintained by the guardians of a poor law union and (i.) the child has been deserted by its parent; or (ii.) the guardians are of opinion that by reason of mental deficiency, or of vicious habits or mode of life, a parent of the child is unfit to have the control of it; or (iii.) a parent is unable to perform his or her parental duties by reason of being under sentence of penal servitude or of being detained under the Inebriates Act, 1898; or (iv.) a parent of the child has been sentenced to imprisonment in respect of any offence against any of his or her children; or (v.) a parent of the child is permanently bedridden or disabled, and is the inmate of a workhouse, and consents to the resolution hereinafter mentioned; or (vi.) both the parents, or in the case of an illegitimate child the mother of the child, are or is dead; the guardians may at any time resolve that until the child reaches the age of eighteen years all the rights and powers of such parent as aforesaid, or if both parents are dead of the parents, in respect of the child shall, subject as in this Act mentioned, vest in the guardians, and thereupon those rights and powers shall so vest accordingly, and shall continue so vested whether the child does or does not continue to be maintained by the guardians.

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unlawfully and knowingly assisted her child, Aimée Nowlan, who had been placed under the control of the Eastbourne guardians, to leave, without the guardians' consent, the place where she was under that control.

At the hearing on March 2, and on adjournment on March 9, the following facts were proved or admitted: The respondent, Mrs. Nowlan, became a widow in May, 1912, and was left with three children, including the child Aimée Nowlan. From November 5, 1912, Aimée Nowlan, then about twelve years of age, until April 17, 1914, was maintained by the Eastbourne guardians at one of their cottage homes, or at Brockham, where she was being trained for domestic service. On April 17, 1914, the following resolution was passed by the Eastbourne guardians: "That in pursuance of the authority vested in the guardians by the Poor Law Act, 1899, s. 1, the undermentioned children chargeable to this union be placed under the control of the guardians of the Eastbourne union until the said children shall reach the age of eighteen years, viz., Aimée Nowlan, thirteen years, Lilian Brockhurst, thirteen years." From the date of that resolution till September 12, 1916, Aimée Nowlan was under the control of and was maintained by the guardians at Eastbourne or at Brockham; but on September 12, 1916, she was placed in domestic service at Haslemere, and she there remained under the control of the guardians till February, 1917, when she left without the guardians' consent, the respondent knowingly assisting her to leave without such consent. On March 6, 1917, but on no occasion prior thereto, a complaint was made by the respondent,

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Provided that the guardians may rescind the resolution if they think that it will be for the benefit of the child that it should be rescinded . . . ."

Sub-s. 2: "A court of summary jurisdiction, if satisfied on complaint made by a parent . . . . that there was no ground for the resolution, or that it is for the benefit of the child that it should be either permanently or temporarily under the control of its parent . . . . or that the resolution of the guardians should be determined, may make an order accordingly . . . . and if the order determines the resolution the resolution shall be thereby determined as from the date of the order . . . ."

Sect. 2 imposes a penalty upon a person who knowingly assists a child who has, in pursuance of s. 1, been placed under the control of the guardians, to leave, without the guardians' consent, the place where the child is under that control.

which was entered for hearing on March 9, that the guardians had no grounds for their resolution of April 17, 1914.

The justices held that as it was not expressly stated in the resolution on which of the grounds (if any) set out in s. 1, sub-s. 1, of the Poor Law Act, 1899, the resolution of April 17, 1914, was passed, the appellant was bound to prove by affirmative evidence that one of the six grounds mentioned in the sub-section existed when the resolution was passed.

For the appellant it was contended that the justices were bound by the resolution, the same not having been rescinded, varied or determined, as provided by the Act; that it was not necessary for any evidence to be called by the appellant to establish as a fact that the resolution had been passed because of the then existence of any one or other of the grounds set forth in s. 1, sub-s. 1, of the Act, but that the resolution duly produced and proved or admitted was of itself sufficient; and that the resolution could only be determined by a complaint made under s. 1, sub-s. 2, of the Act, and that having regard to s. 11 of the Summary Jurisdiction Act, 1848, the respondent's complaint was more than two years out of time.

No evidence was before the justices as to the existence or non-existence of any of the several grounds mentioned in s. 1, sub-s. 1, of the Act, except the resolution of April 17, 1914, itself, and as they were of opinion that in the absence of evidence on behalf of the appellant to prove that one or other of those grounds existed for the passing of the resolution they were bound to dismiss the information by the appellant, which they accordingly did, and they allowed the respondent's complaint to be withdrawn.

The question for the opinion of the Court was whether the justices were right in dismissing the information on the ground stated.

Thorn Drury, K.C., *Horton-Smith*, and *Van den Berg*, for the appellant. There is nothing in the Poor Law Act, 1899, requiring the guardians to state any particulars of the grounds upon which they act in passing a resolution vesting the rights and powers of a parent in themselves, and no evidence is necessary in a prosecution under s. 2 beyond the resolution itself to establish that it was duly passed. The resolution must be taken to have been properly and duly passed. Provision is made by s. 1, sub-s. 2, for obtaining the

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determination of such a resolution, and the ordinary rule applies as to the time within which a complaint can be made, namely, six months from the date of the resolution.

The respondent was not represented.

DARLING J. In this case the justices dismissed the information upon the ground that no evidence was given on behalf of the appellant as to the grounds upon which the guardians' resolution was passed or that the grounds upon which they acted in passing the resolution were in fact good. That evidence was not necessary, and therefore the justices were wrong. The appeal must accordingly be allowed and the case remitted to the justices.

AVORY and SANKEY JJ. concurred.

Appeal allowed.

Solicitor for appellant: *F. Lawson Lewis, Eastbourne.*

J. S. H.

C. A.

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July 5.

[IN THE COURT OF APPEAL.]

MORRISON *v.* LORD MAYOR, &c., OF SHEFFIELD.

Local Government—Urban Authority—Trees planted in Highway and protected by spiked Guards—Personal Injury—Street Lighting prohibited under Defence of Realm Regulations—Duty of Urban Authority—Public Health Acts Amendment Act, 1890 (53 & 54 *Vict. c.* 59), *s.* 43.

The defendants, an urban authority, acting under the provisions of s. 43 of the Public Health Acts Amendment Act, 1890, planted trees in certain of their highways, and surrounded each tree with an iron spiked guard. Subsequently to the erection of the guards an order was promulgated by the chief constable, acting under the Defence of the Realm Regulations, by which all street lights in the defendants' area were ordered to be extinguished at a certain hour. The plaintiff, who was crossing a road at night in the darkness, came into contact with one of the guards and suffered very serious injury. In an action to recover damages for negligence, the jury found that the guard was dangerous in the circumstances of the darkness that existed, and that the defendants had not taken

reasonable measures to neutralize the danger; the judge entered judgment for the plaintiff:—

Held, that after the promulgation of the lighting order there was a continuing duty on the defendants to take reasonable measures to prevent the guard from being a danger to the public lawfully using the road, and that the plaintiff was entitled to maintain his action.

Great Central Ry. Co. v. *Hewlett* [1916] 2 A. C. 511 distinguished.

APPLICATION of the defendants for judgment or for a new trial of an action tried before Rowlatt J. and a special jury at Leeds.

The defendants, as the urban authority, had the control of the roads and streets in Sheffield. Acting under the provisions of s. 43 of the Public Health Acts Amendment Act, 1890 (1), the defendants caused trees to be planted in various highways within the borough of Sheffield; each tree was, for the purpose of protection, surrounded by an iron guard consisting of upright posts terminating at the top in spikes, the tops being bent downward to prevent boys from climbing up; the guards were 5 ft. 2½ ins. high from the ground, and the particular guard in question in the present case inclined about 3 inches out of the perpendicular in the direction in which plaintiff approached it.

By an order made under the Defence of the Realm Regulations for the Central Area, dated February 8, 1916, power was given to local authorities to regulate the lighting of their districts, and on April 3, 1916, the chief constable of Sheffield, acting under the provisions of this regulation, ordered that until further notice all the street lights in Sheffield should be extinguished after a certain hour.

On April 20, 1916, shortly after 9 P.M., the plaintiff was lawfully in one of the roads in Sheffield; owing to the street lights being all out it was pitch dark, and after crossing the road the plaintiff walked into the guard of one of the trees, one of the spikes at the top of the guard hitting him in the eye, and causing very serious injury, to recover damages for which the present action was brought.

(1) By 53 & 54 Vict. c. 59, s. 43, "Any urban authority may, if they see fit, cause trees to be planted in any highway repairable by the inhabitants at large within their district, and may erect guards or fences for the protection of the same, provided that this power shall not be exercised nor shall any trees so planted be continued so as to hinder the reasonable use of the highway by the public or any person entitled to use the same, or so as to become a nuisance or injurious to any adjacent owner or occupier.

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At the trial Rowlatt J. left the following questions to the jury :—

1. Was the guard dangerous in the circumstances of the darkness that existed ?

2. Ought the defendants, if they exercised reasonable foresight and took reasonable measures, to have neutralized the danger before the date of the accident ?

The jury answered both questions in the affirmative and gave a verdict for 660*l.* 16*s.* damages.

The learned judge gave judgment for the plaintiff.

The defendants appealed.

Tindal Atkinson, K.C., and *H. T. Waddy*, for the defendants. There was evidence that the accident would not have happened had the lamp been lighted ; there was therefore no negligence in the way in which the guard was originally placed in position under statutory authority. There was no evidence given on behalf of the plaintiff that means could have been taken to render the guards visible under the conditions of darkness. There was no duty on the part of the defendants to take any measures to protect the guards under abnormal circumstances which were not brought about by themselves. The case of *Great Central Ry. Co.* v. *Hewlett* (1) is an authority against the liability of the defendants to take measures to avert danger created by the lighting order. [They also cited *Moore* v. *Lambeth Waterworks Co.* (2)]

Waugh, K.C., and *T. E. Ellison*, for the plaintiff. Every obstruction of a public highway is a nuisance, unless it can be justified. This obstruction cannot be justified under s. 43 of the Act of 1890, which provides that the trees shall not be continued so as to hinder the reasonable user of the highway by the public or by any person entitled to use it. Whenever an Act of Parliament authorizes a person to construct anything it casts upon him a duty to take care that it shall not injure other people. It was the defendants' duty, if they exercised their powers under s. 43 of the Act, to erect a guard which would be reasonably safe at all periods of the twenty-four hours ; this guard was not safe unless it was lighted ; therefore when lighting was forbidden the defendants ought to have taken reasonable measures to render it safe. It was unsafe because it

(1) [1916] 2 A. C. 511. (2) (1886) 17 Q. B. D. 462.

was out of plumb and the spikes were only 5 ft. 2½ ins. from the ground. The Act did not authorize the erection of this particular guard, and the case is in this respect distinguishable from *Great Central Ry. Co.* v. *Hewlett.* (1)

Tindal Atkinson, K.C., in reply. The guard was in fact safe under normal conditions, and the duty of the defendants cannot be enlarged by the provisions of the lighting order. If the duty contended for by the plaintiff exists, it would equally apply in the case of lamp posts, tramway posts, letter boxes, height of kerbstones, &c. The learned judge ought to have withdrawn the case from the jury and entered judgment for the defendants.

VISCOUNT READING C.J. The plaintiff brings this action against the defendants to recover damages for injuries sustained by him resulting in the loss of the sight of one eye and other injuries in consequence of walking into a guard which had been placed by the defendants round a tree in the public highway and which had spikes protruding outwards at a height of 5 ft. 2½ ins. from the ground. The plaintiff was walking along the highway when the night was extremely dark in consequence of a lighting order which had been promulgated by the chief constable under the authority of the Privy Council, and by reason of which all lights were out; the hour was about 10 P.M. It was a specially dark night, and the plaintiff, while lawfully walking along the road, walked into the tree and encountered one of the spikes of the guard with his eye. Two questions were left to the jury: 1. Was the guard dangerous in the circumstances of the darkness that existed? 2. Ought the defendants, if they exercised reasonable foresight and took reasonable measures, to have neutralized the danger before the date of the accident? The answer to both these questions was in the affirmative. The jury gave 660*l.* damages, and judgment was entered for the plaintiff. The defendants appeal on the ground that there was no evidence to justify the finding, as there was no evidence that the defendants had been guilty of want of care or that the tree and guard constituted a nuisance, and it has been argued that the learned judge ought to have entered judgment for the defendants at the end of the plaintiff's or of the defendants' case because it was not shown that the defen-

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Viscount Reading C.J.

dants had committed any breach of duty. The basis of the argument was that the trees were planted and the guards erected under statutory authority, and reliance was placed upon s. 43 of the Public Health Acts Amendment Act, 1890; that section says: "Any urban authority may, if they see fit, cause trees to be planted in any highway repairable by the inhabitants at large within their district, and may erect guards or fences for the protection of the same, provided that this power shall not be exercised nor shall any trees so planted be continued so as to hinder the reasonable use of the highway by the public or any person entitled to use the same, or so as to become a nuisance or injurious to any adjacent owner or occupier." The defendants contend that, having erected the guard round the tree at times and in circumstances when it cannot be contended that the place was not reasonably safe, no further duty was imposed upon them by the order which plunged the city into darkness. This is the substantial point in the case. It is not contended that, when statutory power is given to erect trees and guards round them, the authority to whom the power is given is not bound to exercise reasonable care in carrying out their powers having regard to the reasonable protection which the public is entitled to expect; but it is contended that, when, as in the present case, it cannot be suggested that there was any nuisance or want of reasonable care before April 3, when the order forbidding lighting was issued, there is no greater duty cast upon the authority to take further precautions.

I am unable to accept that view of the law. In my judgment the obligation on the defendants continues as long as the trees and guards are maintained in the public highway. There is no duty to keep them absolutely safe, but it is their duty to use reasonable care, and they are not entitled to let the trees and guards remain in a condition which renders them dangerous to the public who are using the highway. Whether they have taken reasonable precautions in the particular case is a matter for the jury. I am not prepared to say that in the present case I should have given the same verdict, but that is not the question. If there is a duty on the defendants to take reasonable care in the circumstances, it is a question of degree what amount of care should be exercised, and that must be a question for the jury, and I am not prepared to say there was no evidence of an absence of reasonable care.

Reference has been made to the case of *Great Central Ry. Co.* v. *Hewlett* (1), although defendants' counsel did not rely upon it as a conclusive authority in his favour, and upon examination it is plain that that decision does not go so far as the defendants' contention in the present case. There the railway company had erected a gateway with a post in the public highway ; and after the issuing of a lighting order imposing darkness a taxicab-driver drove into the post and damaged his cab. It was contended that the railway company ought to have taken some such precaution as painting the post white so that it could be seen in the darkness. But the House of Lords said that Parliament had by statute permitted the railway company to keep the specific thing, the gateway and post, where it was, and that there could not be an obligation on the railway company to do anything else than carry out the authority which the statute had given them. But the general principle of law is not in controversy here, though it is said that it has no application to the present case. That is where I differ from the argument on behalf of the defendants. I have come to the conclusion that the duty was continuing ; that the degree of care required was not exhausted by erecting the guards so as to be reasonably safe for the protection of the public at the time of their erection ; and that the duty continued to so keep them as not to be dangerous to the public using the highway. I think that the learned judge was right and that it was a question of fact whether the defendants had been guilty of negligence in maintaining the guard under the circumstances.

We have had considerable argument as to whether the point was open to the plaintiff that the condition of the guard, which was $3\frac{1}{2}$ inches out of the perpendicular and was 5 ft. $2\frac{1}{2}$ ins. high up to the projecting point, was a cause of the accident, and I am inclined to the view that, as the case was conducted, the plaintiff took his stand on the case as presented in the summing-up of the learned judge. The appeal must be dismissed.

PICKFORD L.J. I agree. The tree and guard were erected under powers conferred by s. 43 of the Public Health Acts Amendment Act, 1890, and therefore the defendants acted rightly in putting them where they were. But the keeping of them there involved

(1) [1916] 2 A. C. 511.

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the taking of reasonable care by the defendants that they should not be a danger to the public. We start with the fact that the place was safe under ordinary conditions, and it is said that there was no obligation on the defendants to see that it did not become a danger under the altered conditions. I do not agree with that contention; I think there was an obligation on the defendants to take reasonable care to see that it was not a danger under the altered conditions. I do not say that I should have come to the same conclusion on the question of fact as that to which the jury came. The lighting order came into existence suddenly, it was indeterminate in its duration, and a very short time had elapsed between the promulgation of the order and the accident. All these things ought to be considered, and I do not say that I should have come to the conclusion that want of reasonable care had been made out. But if the jury considered that there was an opportunity for the taking of precautions by the defendants, and that none at all were taken, while the taking of one might have avoided the accident, I cannot say that there was no evidence for the jury. It is said that our decision will involve a hardship on local authorities and will impose on them an obligation to guard or to paint every post and kerb, but in truth it only imposes an obligation to take reasonable care that what they have put in the roadway shall not become a nuisance and a danger under altered conditions. I agree that the appeal must be dismissed.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *H. G. Campion & Co., for Clegg & Sons, Sheffield.*

Solicitors for defendants: *Rollit, Sons & Compston, for W. E. Hart, Town Clerk, Sheffield.*

W. J. B.

FURNESS, WITHY & CO. *v.* REDERIAKTIEGOLABET BANCO.

1917
July 31.

Charterparty—Foreign Ship—Ship lying in British Port—Prohibition against intended Voyage by Law of Country of Owners—Restraint of Princes.

By a charterparty made in the United Kingdom in 1916 the defendants, as owners of a Swedish ship, chartered her to the plaintiffs for a period of six months for trading between certain ports, all of which were outside Sweden. Losses by restraints of princes were excepted. The owners and the master were Swedish subjects ordinarily resident in Sweden. The ship being at Cardiff the plaintiffs proposed to send her with a cargo of coals to Genoa, one of the charterparty ports. The defendants refused to allow her to go there on the ground that under the Swedish emergency legislation the ship was prohibited from carrying goods for freight between ports outside the Swedish kingdom, the owners and master being rendered liable to imprisonment for any breach of that prohibition. In an action to restrain the defendants from using the ship otherwise than in accordance with the charterparty the defendants relied on the exception of restraints of princes:—

Held, that the fact of the ship being outside Swedish territorial limits, and of the Swedish Government consequently not being in a position to enforce the restraint directly upon the ship, did not prevent the prohibition from operating as a restraint of princes; it was enough for that purpose that the Swedish Government was capable of enforcing the restraint upon the persons having the custody of the ship.

TRIAL of action before Bailhache J.

By a charterparty made in the United Kingdom and dated November 13, 1916, the defendants, as owners of the Swedish steamship *Zamora*, of 3186 tons gross register, chartered her to the plaintiffs for a period of six months for trading between good and safe ports within the following limits: "United Kingdom, Continent (Dunkirk/Sicily limits), Africa, North and South America, including Canada." By the charterparty losses or damages arising or occasioned by arrests or restraints of princes, rulers, or peoples were excepted. On November 15, 1916, the steamer, being then on hire, loaded a cargo of coals at Barry for carriage to Genoa. She sailed and discharged her cargo, and returned to Cardiff, where the plaintiffs proposed to load another cargo of coals for carriage to Italy,

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While she was at Cardiff the defendants refused to allow the plaintiffs to have further use of her, on the ground, amongst others, that, under the Swedish emergency legislation, Swedish ships of more than 200 tons gross register were prohibited from carrying goods for freight between ports outside the Swedish kingdom, the owners and master being rendered liable to imprisonment for any breach of that prohibition. The plaintiffs brought the action to restrain the defendants from using the ship otherwise than in accordance with the terms of the charterparty. The defendants relied on the exception of restraints of princes. The ship was still at Cardiff at the date of action brought.

Leck, K.C., and *R. A. Wright*, for the plaintiffs. The charterparty having been made in the United Kingdom must be construed according to English law, and by English law there is nothing to render illegal a voyage between a British and Italian port. The contract therefore is valid and binding on the defendants. The fact that such a voyage is illegal by the law of Sweden does not under the circumstances operate as a restraint of princes, for the ship was at all material times outside the jurisdiction of the Swedish Courts.

C. R. Dunlop (*Roche, K.C.*, with him), for the defendants. It is not contended that the Swedish law by prohibiting the proposed voyage makes the contract illegal and unenforceable against the defendants. The question in dispute is not as to the legality of the contract, but as to whether the prohibition has the effect of a restraint of princes so as to bring the defendants within the exception.

[BAILHACHE J. For that purpose must not the Government of the country, the law of which prohibits the carrying out of the contract, be in a position to enforce the prohibition on the subject-matter of the contract? Here the Swedish Government could not do so, for the ship was in British waters.]

No. As was pointed out by Bramwell B. in *Rodoconachi* v. *Elliott* (1), the word "restraint" is "more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods." It is sufficient here that the owner and master will be liable to prosecution and imprisonment if

(1) (1874) L. R. 9 C. P. 518, 523.

they disobey the prohibition. They are the persons having the custody of the ship. In *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1) Bailhache J. admits that "force is not necessary to constitute restraint of princes." Lord Reading C.J. says (2) that the expression "restraint of princes" implies "some interference out of the ordinary course of events by the governing authorities who have the force of the State behind them to compel submission to their authoritative decrees." And Bray J. said (3): "Probably it may be necessary that the restraint should be capable of being enforced by force if necessary, but that consideration is fulfilled here, because if the owner or master had persisted in prosecuting the voyage, not only could the ship and goods have been confiscated, but the owner or master could have been prosecuted and sent to prison."

[BAILHACHE J. But assuming that it is enough that the restraint should be imposed upon the persons having the custody of the subject-matter instead of upon the subject-matter itself, is it enough that the law imposing the penalty is the law of a foreign country? In *Sanday's Case* (1) it was the law of this country.]

Yes. It is enough if the persons having the custody of the subject-matter are amenable to the foreign law. In *Miller* v. *Law Accident Insurance Co.* (4) the law which was held to be a restraint was the ordinary municipal law of the Argentine Republic. There the captain was amenable to the Argentine law because he was actually within its jurisdiction. Here the master and owner, although outside the Swedish jurisdiction, were amenable to the Swedish law by reason of the fact that they were Swedish subjects and ordinarily resident in Sweden.

BAILHACHE J. This is a case in which, if it had not been that we are now sitting on July 31, I should have liked to express my judgment more carefully than I can do on the spur of the moment, but the point to be decided is quite a short one. On November 13, 1916, the Swedish owners of a steamer called the *Zamora* made in the United Kingdom a six months' charter of her to the plaintiffs. By the terms of the charter she was

(1) [1915] 2 K. B. 781, 789.
(2) Ibid. 800.
(3) [1915] 2 K. B. 827.
(4) [1902] 2 K. B. 694.

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to be employed during those six months on voyages within certain limits of which it is sufficient to say that they were all outside the kingdom of Sweden. The charter, which was on a Baltic and White Sea time charter form, contained the exception, amongst others, of restraints of princes. Now it appears that there was at the date of the charter some emergency legislation in Sweden, which is very similar in form to our own emergency legislation, and under which the King of Sweden made a decree that "goods shall not be carried between places outside the kingdom by Swedish vessels of a gross tonnage of 200 tons register or more." The gross register tonnage of the *Zamora* exceeded 200 tons. The vessel having been chartered in this country, the contract is an English contract and has to be construed according to English law. She went on one voyage from Barry to Genoa, and having returned to Cardiff was about to proceed on another similar voyage when the owners objected, not upon the ground that there was any restraint of princes, but upon the ground of the danger which the ship incurred in navigating the waters between this country and Italy. They now, however, seek to justify their refusal to proceed with the charter upon the ground that they are prevented from doing so by the Swedish law, which they say operates as a restraint of princes; and if they are right in that contention they are perfectly entitled to rely upon that ground of justification. It is conceded by Mr. Dunlop, and is, I think, clear law, that the mere fact that a contract is illegal by the law of a foreign State of which one of the contracting parties is a subject will not make that contract unenforceable here if it is an English contract and is to be construed according to the English law. Therefore if it were not for the exception of restraints of princes the owners could not possibly rely upon the fact that this charter is illegal according to Swedish law. But the charterparty does contain that exception. I was for some time in doubt whether a restraint of princes can ever arise from a prohibition imposed by the law or Government of a foreign State, except where the foreign Government is in a position to prevent the performance of the contract by the application of force directly to the subject-matter of the contract —in this case the ship or cargo. I am not aware of any case in which it was expressly decided that such a prohibition amounted to a restraint of princes where the foreign Government were not able to

enforce it by physical action upon the subject-matter. But Mr. Dunlop has referred me to various passages in the judgments in *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1) and in the judgment of Bramwell B. in *Rodoconachi* v. *Elliott* (2), which point to the conclusion that a prohibition may amount to a restraint of princes although the restraint can only operate upon the persons having the custody of the subject-matter, and not upon the subject-matter itself; and that where the law of a foreign State prohibits the performance of a contract, such as a charterparty, and renders the owner or master of the ship liable to fine or imprisonment if he disobeys that law, you have a case of restraint of princes provided the owner or master are subject to the jurisdiction of the foreign State either by being physically within its territory or by being subjects of that State. I doubt whether this is not carrying the meaning of the exception "restraints of princes" further than it has er been carried before; but it seems to me that if I am to follow the dicta in the judgments to which I have referred I must so hold. The result is that there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Downing, Hancock, Middleton & Lewis.*
Solicitors for defendants: *Thain Davidson & Co.*

(1) [1915] 2 K. B. 781, 789, 800, 827. (2) L. R. 9 C. P. 518, 523.

J. F. C.

K. B. D.
1916
May 22.
C. A.
1917
Feb. 15.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

McVITTIE *v.* MARSDEN.

Justices—Protection of—Conviction confirmed by Quarter Sessions—Issue of Distress Warrants by Justice—Conviction and Confirmation quashed by High Court—Action against Justice for Illegal Distress—Justices' Protection Act, 1848 (11 & 12 *Vict. c.* 44), *s.* 6.

The plaintiff was summarily convicted by justices and fined, and on appeal to quarter sessions the conviction was confirmed. After the confirmation, the defendant, a justice of the peace, issued distress warrants under which the plaintiff's goods were seized. Subsequently the High Court made absolute rules nisi for a certiorari to quash the conviction and the confirmation on the ground that the original summons had not been properly served on the plaintiff. The plaintiff then issued the writ in the present action against the justice who issued the distress warrants, claiming damages for an illegal distress:—

Held, that the defendant was protected by s. 6 of the Justices' Protection Act, 1848, and that the action would not lie.

Decision of Low J. affirmed.

APPEAL of the plaintiff from the judgment of Low J. in an action brought against the defendant, a justice of the peace, to recover damages for illegal distress.

The facts were set out in the statement of claim, which was substantially as follows:—

1. The plaintiff is the proprietor of a picture hall at Oldham where he carried on cinematographic entertainments for profit; and the defendant is a justice of the peace for the borough of Oldham.

2. On December 21, 1914, the defendant and other justices, purporting to sit in petty sessions, wrongfully and without any jurisdiction convicted the plaintiff and adjudged that the plaintiff should forfeit the sums hereinafter specified.

Particulars.

Offence.	*Fine.*	*Costs.*
	£ s. d.	£ s. d.
That the plaintiff, on December 7, 1914, being the occupier of the said picture hall unlawfully did allow those premises to be used for the public exhibition therein of pictures by means of a cinematograph, for the purpose of which inflammable films were used, without having obtained a licence from the council of the borough of Oldham authorizing such exhibition	5 0 0	0 9 6
The like offence on December 8, 1914	0 10 0	0 9 0
The like offence on December 9, 1914	0 10 0	0 9 0
The like offence on December 10, 1914 ...	0 10 0	0 9 0
The like offence on December 11, 1914 ...	0 10 0	0 9 0

3. The plaintiff, as the defendant and the said justices at the time of such conviction and at all material times well knew or ought to have known, had not been served with any summons in respect of any of the alleged offences according to law or at all.

4. The plaintiff appealed to the Oldham Quarter Sessions against the said conviction, and the recorder, without any jurisdiction in that behalf, confirmed the same.

5. By letters the defendant informed the clerk to the justices of Oldham (whereof the defendant is one) that the plaintiff had not been served with a summons in respect of the said proceedings and contended that the justices had no jurisdiction to convict the plaintiff as aforesaid.

6. On July 27, 1915, the King's Bench Division caused a writ of certiorari to issue to the Recorder of Oldham directing him to send the order made by the said recorder confirming the said conviction to the King's Bench Division, and directed that the same be quashed when returned; and the said order and the said conviction have in fact been quashed pursuant to such direction.

7. On March 1, 1915, the defendant wrongfully and without any jurisdiction in that behalf, though, as he knew or ought to have known, the said conviction was made without jurisdiction and was of no validity in law, by five warrants under his hand, ordered distresses to be levied of the goods of the plaintiff in respect of the

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several sums adjudged to be paid by the plaintiff by the said conviction.

8. Acting upon the said warrants, a number of police officers wrongfully broke and entered and trespassed upon the plaintiff's said picture hall and wrongfully removed therefrom certain seats and a pianoforte the property of the plaintiff. The said seats were damaged in the course of such removal.

9. On March 3, 1915, the plaintiff, under compulsion of the said wrongful seizure, paid the clerk to the justices for the borough of Oldham under protest the sum of 10*l.* 5*s.* 6*d.*, and thereby obtained the release of the said goods.

10. [This paragraph dealt with the damages.]

The defendant by his defence (inter alia) denied he had wrongfully or without jurisdiction convicted the plaintiff or issued the distress warrants, and pleaded that the plaintiff had not alleged malice or want of reasonable and probable cause. He also relied on ss. 1 and 6 (1) of the Justices' Protection Act, 1848, and in the alternative paid into Court the sum of 2*d.* under s. 13 of the Act.

The plaintiff in his reply did not allege malice or want of reasonable and probable cause.

The Plaintiff in person.

Cyril Atkinson, K.C., and *E. Acton*, for the defendant.

1916. May 22. Low J. The plaintiff sues the defendant, one of the justices of the borough of Oldham, for damages for illegal distress, and the facts are shortly as follows. In December, 1914, a summons was issued against the plaintiff for alleged offences against the Cinematograph Act, 1909, in allowing an exhibition in which inflammable films were used in a hall kept by him and not licensed by the local committee for the exhibition of inflammable films.

(1) By the Justices' Protection Act, 1848 (11 & 12 Vict. c. 44), s. 6: "In all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order which, either before or after the granting of such warrant, shall have been or shall be confirmed upon appeal, no action shall be brought against such justice who so granted such warrant for anything which may have been done under the same by reason of any defect in such conviction or order."

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The plaintiff did not appear upon the hearing of the summons, and in his absence was convicted and fined. He afterwards appealed to the recorder sitting in quarter sessions, where his appeal was duly called on. The order of the recorder has been produced before me, and it purports to order that the conviction of the plaintiff be confirmed. In March, 1915, the defendant, acting as a justice of the peace for the borough, issued distress warrants for the recovery of the fines and costs; the warrants were duly executed by the officers of the Court, and the plaintiff's goods were seized and removed. Subsequently the plaintiff, in order to redeem his goods, paid under protest the amounts for which the levies were made. In July, 1915, rules were made absolute by a Divisional Court quashing both the conviction and the order of the recorder confirming it; they were quashed upon the ground that there was a defect in the original hearing before justices in that the summons, upon which the conviction was based, had not been properly served upon the plaintiff—that, instead of being served at his place of abode, it had been served on his servant at a shop or office at which he carried on business.

The question before me is whether under these circumstances this action is maintainable. Counsel for the defendant relies upon s. 6 of the Justices' Protection Act, 1848, which is in these terms: [His Lordship read the section.] Now it is clear that in this case there was a defect, and a vital defect, in the conviction. It was urged on behalf of the defendant that the meaning of "confirmed upon appeal" must be "confirmed in fact upon appeal"; and it is somewhat difficult to see how any case could arise in which protection could be required unless something happened to the order confirming the conviction, because in the ordinary course, if the order were confirmed, the penalties would stand and there would be an end of the matter. On the other hand, it has been argued for the plaintiff that "confirmed upon appeal" must mean "properly or legally confirmed upon appeal," and that if the confirmation by the order of the Court of quarter sessions is subsequently itself set aside by the intervention of a superior Court it for all purposes becomes a nullity and affords no protection to the justice. It seems to me that the real intention of the statute is to protect justices under circumstances in which they themselves were not the adjudicating authority, and to say that if they acted with an actual

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confirmation before them by the Court of quarter sessions of a conviction, so far as they were concerned, they should be absolutely protected. I think that, the conviction having in fact been confirmed by the recorder, the justice is protected by the operation of s. 6 from any consequences by reason of his having issued a distress warrant, however invalid the conviction itself may have originally been. I may add that it was agreed between the parties that this point should be determined by me as a preliminary point of law before going to the jury; I therefore hold that there is no case here to go to the jury, and give judgment for the defendant with costs.

The plaintiff appealed.

Kingsbury, for the plaintiff. The learned judge was wrong in withdrawing the case from the jury. The true meaning of s. 6 is that, if the justice takes the responsibility of issuing a warrant of this kind on a conviction and there is an appeal which finally upholds the conviction, though there is some defect in the conviction, the justice is not liable, but that he is liable to an action if the conclusion of the proceedings is that the conviction is finally quashed.

[SWINFEN EADY L.J. The action is in respect of a conviction which was confirmed on appeal by the recorder before the warrant was granted; is it not precisely within the protection of the section?]

No; the effect of what has happened is that the conviction is gone and the confirmation is gone; neither conviction nor confirmation was legal; the conviction and the confirming order were void ab initio. The section only protects the justice when the confirmation by quarter sessions is not subsequently quashed; the justice issued the warrants at his own risk. If the plaintiff had after the conviction gone direct to the Divisional Court instead of appealing to quarter sessions, the defendant would not have been protected by the section, and he equally cannot be protected by a confirming order which the recorder had no jurisdiction to make.

Cyril Atkinson, K.C., and *Barrington-Ward*, for the defendant, were not called upon.

1917. Feb. 15. SWINFEN EADY L.J. This is an appeal by the plaintiff from a judgment of Low J., who held that there was no case

to go to the jury and directed judgment to be entered for the defendant. The action is one to recover damages for illegal distress; the defendant is a justice of the peace, and it is said that he improperly issued a distress warrant under which the plaintiff's goods were taken in execution and the plaintiff thereby suffered damage. The short facts are that the plaintiff was summoned in respect of five alleged separate offences, committed on five separate days, charging him with a breach of the provisions of the Cinematograph Act, 1909, in having inflammable films in a building not licensed for that purpose. The summons was not served upon the plaintiff personally, nor was it left at his place of abode, but at his place of business with his clerk. He caused counsel to be instructed on his behalf, and counsel, being unable to attend on the day fixed for the hearing, asked the chief constable to consent to an adjournment. The latter refused his consent, and thereupon the counsel wrote a letter to the clerk to the justices in which he said there had been no proper service of the summons upon the defendant. This letter did not reach the clerk to the justices before the summons was heard, and the summons was treated as having been duly served, and the plaintiff was convicted and fined. He appealed to quarter sessions, one of the grounds of his appeal being that he had not been properly served with the summons, and in the following January the conviction was confirmed by the recorder. In March the distress warrants were issued by the defendant, under which the plaintiff's goods were seized; the amount was paid by the plaintiff under protest. Then in June the plaintiff applied in the King's Bench Division for rules to bring up and quash the conviction and the recorder's confirming order, and ultimately they were both quashed.

The first question for us is whether the plaintiff can maintain this action, regard being had to s. 6 of the Justices' Protection Act, 1848, which, read shortly, provides: "In all cases where a warrant of distress . . . . shall be granted by a justice of the peace upon any conviction . . . . which, either before or after the granting of such warrant, shall have been or shall be confirmed upon appeal," —that is this case; the warrant of distress had been granted by the defendant upon the conviction, which before the granting of the warrant had been confirmed on appeal. The section goes

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on:—"no action shall be brought against such justice who so granted such warrant for anything which may have been done under the same by reason of any defect in such conviction or order." The plaintiff complains of the defect in the conviction, the defect being that he was not duly served with the summons; and he complains of that, although his conviction was confirmed on appeal. That is the very thing which s. 6 says shall not be done. I am clearly of opinion that the case is directly covered by s. 6 of the Act of 1848 for the reasons given by the learned judge in the Court below.

Then it is contended that the conviction and the confirmation by the recorder were both quashed and that therefore it must be treated as though there were no conviction, although the conviction had been confirmed on appeal to quarter sessions. That argument is in my opinion not well founded. There was jurisdiction in the Court of quarter sessions to entertain the appeal, and it could have quashed the conviction. Sect. 2 of the same statute contemplates that there may be an appeal to quarter sessions from a conviction which may be quashed on appeal; it uses the words, ". . . . provided nevertheless that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed, either upon appeal or upon application to Her Majesty's Court of Queen's Bench." So the section contemplates that the appeal may be allowed and the conviction quashed; and the plaintiff was entitled to appeal, and upon the appeal to raise the point that he had not been properly served with the summons. The Court had full jurisdiction to deal with the matter on that footing and to hold that it was a fatal objection to the conviction which must be quashed. The ground upon which the order of quarter sessions was quashed by the Divisional Court was not that it had no jurisdiction to deal with the matter, but because, the conviction itself having been quashed, it would not be right to leave the order of quarter sessions standing, as it confirmed the conviction and would seem to leave it still standing. The position, therefore, was simply this: there was a conviction by justices; it was confirmed on appeal, and, that being so, no action can be brought for anything done under it. For these reasons I am of opinion that this appeal should be dismissed.

BANKES L.J. I agree, and have nothing to add.

LUSH J. I agree.

Appeal dismissed.

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Solicitors for plaintiff: *Hargraue, Son & Barrett.*

Solicitors for defendant: *Field, Roscoe & Co., for Wrigley, Claydon & Trustram, Oldham.*

W. J. B.

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Sept. 19, 20.

Army—Exemption as "regular ministers of any religious denomination"—Person becoming Minister after "appointed date"—Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *Sched. I., clause* 4—*Military Service Act*, 1916 (*Session* 2) (6 & 7 *Geo.* 5, *c.* 15), *s.* 1, *sub-s.* 1.

By s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), "Every male British subject who . . . . for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916 . . . . or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted . . . . and to have been forthwith transferred to the reserve. . . . . The appointed date shall, as respects men who come within the operation of this section on the passing of this Act, be the thirtieth day after the date of the passing of this Act. . . . ."

Clause 4 of the exceptions set out in the First Schedule to the Military Service Act, 1916, contains the exception "Men in holy orders or regular ministers of any religious denomination."

The appointed date for the appellant (who was between the ages of eighteen and forty-one years on the passing of the Act of 1916 (Session 2)) was June 24, 1916, i.e., thirty days after the passing of the Act. In February, 1917, he was formally appointed a regular minister of a religious denomination, but he was not a minister before that date. On May 3, 1917, he was called up for service:—

Held, that from June 24, 1916, the appellant must be deemed to have been duly enlisted in the regular forces and to have been forthwith transferred to the reserve; that he thus acquired a statutory status; that he could not subsequently by any voluntary act on his part—such as being formally appointed a regular minister of a religious denomination—divest himself of that

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status, and he was therefore on May 3, 1917, liable to military service in accordance with the notice of that date.

Held, further, that the words in the sub-section "for the time being" within the exceptions mean that a man must in order to obtain the benefit of an exception in the schedule be within it on the appointed day applicable to him.

Fraser v. *Military Authorities* [1917] W. N. 147; 116 L. T. 447 and *Rex* v. 30*th Battalion Middlesex Regiment Commanding Officer, Ex parte Freyberger*, ante, p. 129, followed.

CASE stated by justices for the county borough of West Hartlepool.

An information was laid against the appellant, Stone, by the respondent, Wood, for that he, the appellant, on July 2, 1917, being a man belonging to the Army Reserve called out on permanent service, without leave lawfully granted or such sickness or other reasonable excuse as is allowed, did fail to appear at the time and place appointed.

On May 25, 1916, the date of the passing of the Military Service Act, 1916 (Session 2), the appellant was a British subject between eighteen and forty-one ordinarily resident in Great Britain. He was a member of the congregation of the Strict Baptists Church, Thornton Street, West Hartlepool, and was baptized there in 1910. Between 1912 and February, 1917, the appellant, an insurance agent, had done much work of the church, the details of which are not material to this report, but which included preaching on Sundays at approximately twenty-six services out of fifty-two. In February, 1917, he was formally appointed (and accepted the appointment) pastor of the church, in accordance with the rules and trust deed by which the church was governed, and his appointment was duly recorded in the church minutes. On May 3, 1917, a written notice calling him up for service under the Military Service Acts was served on the appellant, and he had failed to respond to the notice.

On the part of the appellant it was contended that he, having preached with approbation and regularity and having done nearly all the work of the church from the year 1912, was a regular minister of a religious denomination and came within the exception set out in clause 4 of the First Schedule to the Military Service Act, 1916.

On the part of the respondent it was contended (*a*) that the appel-

lant was not either by formal appointment or service a regular minister of a religious denomination prior to February, 1917; (*b*) that prior to February, 1917, he had not been appointed in accordance with the articles of faith and rules governing the Strict Baptists religion, or the trust deed governing that particular church; (*c*) that he became a regular minister, if at all, after June 24, 1916, i.e., after the thirtieth day from the passing of the Military Service Act, 1916 (Session 2), which in his case was the "appointed date," and that therefore he did not come within the exception set out in the First Schedule to the Military Service Act, 1916.

By s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), "Every male British subject who has at any time since the fourteenth day of August nineteen hundred and fifteen been, or for the time being is, ordinarily resident in Great Britain, and who for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916 (in this Act referred to as the principal Act), as amended by this Act or any subsequent enactment, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in his Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve. . . . . The appointed date shall, as respects men who come within the operation of this section on the passing of this Act, be the thirtieth day after the date of the passing of this Act, and, as respects men who come within the operation of this section after the passing of this Act, be the thirtieth day after the date on which they so come within the operation of this section."

Clause 4 of the exceptions set out in the First Schedule to the Military Service Act, 1916, contains the exception "Men in holy orders or regular ministers of any religious denomination."

The justices decided that the Strict Baptists Church was a religious denomination, but that the appellant was not, either before or after February, 1917, a regular minister within the meaning of the Military Service Act, 1916.

The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

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Shortt, K.C., and *Enness*, for the appellant. Whether the appellant was or was not a regular minister before February, 1917, it is clear that subsequently to that time he was a regular minister of a religious denomination and was therefore within clause 4 of the exceptions set out in the First Schedule to the Military Service Act, 1916, "Men in holy orders or regular ministers of any religious denomination" at the time he was called up on May 3, 1917, and equally when he was charged before the justices for failing to appear. He was "for the time being" within the clause as required by s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2): *Fraser* v. *Military Authorities*. (1)

Branson, for the respondent. The respondent does not dispute that upon the appellant's appointment as pastor in February, 1917, he became a regular minister of a religious denomination, but he was not thereby exempted from military service as being brought within the meaning of the words in clause 4 of the exceptions contained in the First Schedule to the Military Service Act, 1916, "regular ministers of any religious denomination."

The magistrates have found as a fact that the appellant was not a regular minister of a religious denomination before February, 1917, and there was evidence upon which they could so find. Sect. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), enacts that every man within its provisions shall as from the appointed date be deemed to have been enlisted and transferred to the reserve, and therefore the appellant was on June 24, 1916, the thirtieth day after the date of the passing of the Act, enlisted and transferred to the reserve by force of the statute, and when he once came within the operation of the Act a change in his status took place and no act of his done subsequently could free him from the Act: *Rex* v. *30th Battalion Middlesex Regiment Commanding Officer, Ex parte Freyberger*. (2) *Fraser* v. *Military Authorities* (1) shows that when a man has once attained the age of eighteen years he is, on the appointed date, transferred to the reserve if he is not then within one of the exceptions.

Shortt, K.C., in reply. The words in s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), "for the time being within the excep-

(1) [1917] W. N. 147; 116 L. T. 447.
(2) Ante, p. 129.

tions" mean "from time to time." They do not mean that he must be within the exceptions on the appointed date. If it had been intended that exceptions should merely apply on the appointed date express language to that effect would have been used.

DARLING J. The question before us turns on the true construction of s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), which was passed on May 25, 1916, and the exemption given by clause 4 of the exceptions set out in the First Schedule to the Military Service Act, 1916, which came into operation on January 27, 1916. The exemption is one in favour of "Men in holy orders or regular ministers of any religious denomination." It is not contested by Mr. Branson, for the Crown, that the appellant was after February, 1917, a regular minister of a religious denomination within the meaning of the clause; but I agree with the justices that there was no evidence that he was a regular minister of a religious denomination until February, 1917, when he was formally appointed and accepted pastor of the Strict Baptists Church in accordance with the rules and trust deed of the church. The case is exactly the same—there is no distinction with regard to the application of the rule we are about to lay down between one religious body and another—as if the appellant had been ordained as a priest of the Church of England in February, 1917. If the decision we are about to give is right it will mean that a person ordained since he became subject to the Military Service Act, 1916 (Session 2), cannot take advantage of this exception. [The learned judge having read the words of s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), set out above, continued:]

At the time the Act of 1916 (Session 2) was passed the appellant was between the ages of eighteen and forty-one. He was ordinarily resident within the United Kingdom, and therefore the appointed date in regard to him was thirty days after the passing of the Act. From that date, in my judgment, he must be deemed to have been duly enlisted in the regular forces and to have been forthwith transferred to the reserve. At that time he was not a regular minister of any religious denomination. He was doubtless performing many religious services, but in my view the justices were perfectly right in holding that he did not become a regular minister

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until he was formally appointed pastor in February, 1917. The appellant contends, although he was not within the exception on the appointed date, namely, the thirtieth day after the passing of the Act, and did not come within the exception until February, 1917, that by reason of his being appointed pastor in February, 1917, long after he came within the operation of the Act, he, upon his appointment as pastor, came within the exception.

On his behalf Mr. Shortt contended that the words "for the time being" in s. 1, sub-s. 1, of the Act mean "from time to time." On behalf of the respondent Mr. Branson contends that they mean "on the appointed date." They clearly cannot mean "from time to time," for they apply to men who attain the age of eighteen years, and persons do not from time to time attain the age of eighteen years. In my judgment the words mean "on the appointed date." I was at first very much inclined to think that the Legislature could not have intended these words to bear this meaning, because the result is that men who were in holy orders or were regular ministers on the thirtieth day after the passing of the Act obtained the exemption and were not deemed to be enlisted and transferred to the reserve; but as the appellant was appointed a regular minister of the religious denomination after that day he cannot obtain the exemption. I am bound to place that interpretation upon the statute, because it seems to me that the question has already been decided in *Freyberger's Case* (1), where Swinfen Eady L.J. in giving judgment said: "The Act . . . . says that when a person is once enrolled in the Army he is deemed to have been duly enlisted for the period of the war. I see no ground upon which the appellant is entitled to claim his discharge from the Army. There is nothing in the provisions of the Army Act, 1881, which says that if a person becomes an alien he shall thereupon be entitled to be discharged from the Army. Even, therefore, if the appellant were right upon the first point, in my opinion he fails upon the second, and, being properly within the control of the military authorities, he is not entitled to discharge even if he has become an alien." The judgment of the learned Lord Justice appears to me to govern the point before us. The same point was decided in language which is perhaps even more definite and clear

(1) Ante, pp. 129, 139, 140.

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by Bankes L.J., who said : " I agree. It is sufficient for the purpose of disposing of this appeal to consider the second point. It seems to me to be plain from the language of s. 1, sub-s. 1, of the Military Service Act, 1916, that on the appointed date the applicant became subject to the Act, and acquired a certain military status—the status of a person duly enlisted for the period of the war. Having acquired that statutory status, he cannot, in my opinion, by any voluntary act on his part, whether it be a formal declaration of alienage under the Act of 1914, assuming for the moment that he could make it, or any less formal act, divest himself of that status." Applying those judgments to the present case, it follows that the appellant acquired a statutory status the moment thirty days from the passing of this Act had elapsed. His statutory status was that he was a person deemed to have been enlisted for the period of the war and transferred to the reserve, and having acquired that status he could not by any voluntary act on his part divest himself of that status. Being formally appointed a regular minister of a religious denomination was a voluntary act. Suppose he had not been a member of a nonconformist body, but had been ordained a priest of the Church of England. The same reasoning would apply. If he had acquired the statutory status, he could not subsequently divest himself of it, nor could a bishop by ordaining him as a priest divest him of it. In my judgment, therefore, the decision of the justices was right and the appeal should be dismissed.

AVORY J. On May 25, 1916, the date of the passing of the Military Service Act, 1916 (Session 2), the appellant was between eighteen and forty-one years of age; he was ordinarily resident in Great Britain, and on that date he was not within clause 4 of the exceptions set out in the First Schedule to the Military Service Act, 1916, as it is conceded for the purpose of this case that at that date he was not a regular minister of any religious denomination. If it had not been conceded I should have held that there was evidence on which the justices could properly find that at that date he was not a regular minister of any religious denomination. He was therefore a man who came within the operation of s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), on the passing of the Act, and that being so, the appointed date with respect to him was " the thirtieth day after the

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date of the passing of this Act," and he, by the terms of the section, was deemed as from that appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve.

That being so, the decision of the Court of Appeal in *Freyberger's Case* (1) shows that he cannot by any voluntary act after that date divest himself of his liability to serve. In my opinion there is no inconsistency between the decision in *Fraser* v. *Military Authorities* (2) and that in *Freyberger's Case.* (1) On the contrary, the effect of those two cases is to confirm the view which this Court is now taking of s. 1 of the Military Service Act, 1916 (Session 2), because in *Fraser's Case* (2) it was decided that, although the man was not within the operation of the Act at the time when it came into force by reason of his then being an officer in the Army, he subsequently came within the operation of it by ceasing to be an officer in the Army, because he was for the time being a person between the ages of eighteen and forty-one and ordinarily resident in Great Britain. The case is an illustration of the meaning of the words "for the time being," and shows that a man who at the date of the passing of the Act is not within its operation may subsequently come within it by attaining the age of eighteen or for some other reason, e.g., ceasing to be an officer in the Army as Fraser did. In giving judgment Rowlatt J. explained the meaning of the section. He said (3): "What the section means is that where at any particular time a person is ordinarily resident in Great Britain and is between eighteen and forty-one and is not within the exceptions, he is deemed to have been enlisted."

It has been suggested in argument that the words "or who has attained the age of forty-one years before the appointed date" are difficult to construe, the section having already used the words "who for the time being has attained the age of eighteen years and has not attained the age of forty-one years." It appears to me there is obviously a reason for this provision. A statute, unless there is something to the contrary, comes into operation on the date when it is passed, and therefore the men referred to in the Act of 1916

(1) Ante, p. 129.
(2) [1917] W. N. 147; 116 L. T. 447.
(3) 116 L. T. 449.

(Session 2) as men between the ages of eighteen and forty-one are men between those ages on the day the Act was passed; but the statute goes on to provide that, although a man is not forty-one on May 25, 1916, the date of the passing of the Act, if he attains that age before the appointed date, namely, before the thirtieth day after the date when the Act was passed, he is deemed to be exempted. I find no difficulty in construing the section as my brother Darling has done and in holding that the justices were right.

BAILHACHE J., after stating the facts, continued: In my judgment the Legislature by s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), did two things. It first provided for the case of men who would fall within the Act at the appointed date, thirty days after the passing of the Act, and secondly it provided for the future, that is, for men who would come within the purview of the Act during its continuance. In order to do these two things it was enacted that all male British subjects ordinarily resident in Great Britain and between the ages of eighteen and forty-one on the thirtieth day after the date of the passing of the Act were to be deemed to have been enlisted and passed into the reserve and to be liable to be called up at such time as the military authorities thought proper; and it was further enacted that there were certain men who were exempt, amongst others regular ministers of a religious denomination. The statute came into force with regard to the appellant on the thirtieth day after its passing, and prima facie he was then liable to service, and therefore to be deemed to be enlisted. At that time he was not within any of the exceptions in the First Schedule to the Military Service Act, 1916, and so passed into the reserve.

The words "for the time being" were inserted in s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), with reference to men who were not liable at the appointed date, the thirtieth day after the passing of the Act, but who for some reason come under the Act at a later period. If any question of exemption then arises it has to be determined by reference to the period at which apart from exemption the man would come within the operation of the Act. The section might have been more plainly expressed; but, having

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carefully considered the matter, I am of opinion that the justices were right and that the appellant was liable to serve.

Appeal dismissed.

Solicitors for appellant: *J. Lee Smith, for Ogden, Lyles & Co., Manchester.*

Solicitor for respondent: *Treasury Solicitor.*

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Sept. 20.

SIMMONDS *v.* ELLIOTT.

Army —Exemption —"Regular ministers of any religious denomination" —Church of England—Lay Reader—Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *Sched. I., clause* 4—*Justices—Case stated—Non-service of Copy of Notice of Appeal and Case on Respondent before Deposit of Case at Central Office—Jurisdiction to hear Case—Summary Jurisdiction Act*, 1857 (20 & 21 *Vict. c.* 43), *s.* 2.

By s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), coupled with clause 4 of the exceptions contained in the First Schedule to the Military Service Act, 1916, men for the time being "in holy orders or regular ministers of any religious denomination" are exempted from liability to service under the Military Service Acts, 1916:—

Held, that with regard to those religious bodies which include among their members men in holy orders—such as the Churches of England and Rome—members of them who claim exemption under the clause must bring themselves within the words "in holy orders"; but as to any other religious denomination, any man who is a member of it, and who claims exemption under the clause, must, in order to substantiate his claim, show that he is a regular minister of the religious denomination.

A lay reader of the Church of England who devotes his whole time to his office and has no other profession or living but is not in holy orders is not entitled to the exemption from military service conferred by the clause.

In an appeal by way of case stated from a decision of justices difficulty was experienced in serving the respondent with the notice of appeal and a copy of the case, with the result that, when he was ultimately found, instead of the service on him taking place before the case had been lodged at the Central Office in compliance with

s. 2 of the Summary Jurisdiction Act, 1857, it was not effected until half an hour afterwards:—

Held, that, notwithstanding the irregularity in the service, the Court in the circumstances had jurisdiction to hear the appeal.

CASE stated by justices for the county of Surrey.

On May 31, 1917, the respondent, Elliott, was charged in an information preferred against him by the appellant, Simmonds, for that he, the respondent, on May 22, 1917, at Woking in the county aforesaid, then belonging to the Army Reserve and having been called out on permanent service, did unlawfully fail to appear at the recruiting office there, contrary to the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48).

At the hearing before the justices it was proved or admitted that a notice paper was sent to the respondent warning him that he would be required to join for service with the colours on May 22, 1917, and that he should present himself at the Woking recruiting office on that date. The respondent failed to appear as required by the notice paper. He attended at the Woking recruiting office on May 24, 1917, when he claimed to be exempted from military service under the latter part of exception 4 in the First Schedule to the Military Service Act, 1916, namely, as a regular minister of a religious denomination. It was thereupon contended by the appellant that the respondent was not a regular minister of a religious denomination. No evidence as to the reason for that contention was given, but in cross-examination by the appellant the respondent stated that his teaching and preaching were of the Church of England, but that he had not been ordained. The respondent contended that he was a regular minister of a religious denomination. Upon oath he stated that he entered a theological college, promised to devote his life to the service of God, received eighteen months' theological training, passed examinations and was admitted a member of the Evangelist Brotherhood of St. Philip on June 26, 1906. He received a licence as a parochial reader on December 15, 1909, and a commission as a diocesan reader on January 22, 1912, from the Bishop of Chichester, passing two examinations at Brighton for the commission, and, before receiving it, he promised to conform in his ministry to such regulations as were laid down by the bishop of the diocese. He had signed the Thirty-nine Articles, which

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provide that ministers of the Church shall be of sound religion. He had preached in the parish church of Hatherton, Staffordshire, and another consecrated church. On June 24, 1916, he obtained a commission to act as lay reader from the Bishop of Winchester. He was at present in charge of St. Mary's Church, Frimley, and the district it serves, and ministered to the spiritual needs of about 800 people, prepared confirmation candidates, took the whole of the services (with the exception of administering the Communion), superintended the Sunday school and visited the sick, devoted his whole time to his office, and had no other profession or living. Although designated a lay reader he differed from many such, especially those who did their ordinary work during the week and were licensed by a bishop to take services on Sundays, inasmuch as those were not regular ministers of the Church, needing no training for the work, but recommended to the bishop by the rector of the parish. From 1906 his employment in Church work had been constant. Should he leave Frimley the licence and commissions referred to would accompany him, but he would have to obtain authority from the bishop of the diocese in which he went to reside before he could continue his work. None of the statements were contradicted by the appellant, nor did he cross-examine the respondent thereon. The respondent called the vicar of Frimley, who upon oath indorsed his contention, and stated that in his opinion the Church of England is a "religious denomination."

The justices were of opinion that the Church of England is a religious denomination, and upon the facts they found the respondent was a regular minister, and therefore came within the latter part of exception 4 as a regular minister of a religious denomination. As this, in their opinion, constituted a reasonable excuse for his failure to appear at the recruiting office in accordance with the notice paper they dismissed the information.

Exception 4 in the First Schedule to the Military Service Act, 1916, is : "Men in holy orders or regular ministers of any religious denomination."

The question for the opinion of the Court was whether the determination was correct in point of law.

Branson, for the appellant. As the respondent does not appear I ought to inform the Court that the notice of appeal and copy of the

case were not served on him until half an hour after the case had been lodged at the Central Office. By s. 2 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), the appellant shall "within three days after receiving such case, transmit the same to the Court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called the respondent." Difficulty was experienced in serving the respondent with the notice of appeal, but he was ultimately found at Brighton. In the circumstances the Court has jurisdiction to hear the appeal: *Wills & Sons* v. *McSherry*. (1)

DARLING J. There is nothing to prevent the Court hearing the appeal. The respondent was in no way prejudiced, and he does not appear and take the point.

Branson. The respondent was not in holy orders and is not a minister of the Church of England.

The respondent did not appear.

DARLING J. In consequence of our decision in *Stone* v. *Wood* (2) we need not consider any matters which have occurred since June 24, 1916, the appointed date for the respondent, because, unless he acquired the status of being exempt as a regular minister of a religious denomination, before that date he then became a person "deemed . . . . to have been duly enlisted . . . . and to have been forthwith transferred to the reserve," as the exceptions contained in the First Schedule to the Military Service Act, 1916, would not apply to him. The exception upon which he relies is contained in clause 4 of the First Schedule. The appellant is a member of the Church of England. Any functions he discharged were performed by him as a member of the Church of England. He is not in holy orders. The justices agreed with him in his claim that he was entitled to exemption because he was a regular minister of a religious denomination. I think the words "Men in holy orders or regular ministers of any religious denomination" in clause 4 of the exceptions contained in the First Schedule

(1) [1913] 1 K. B. 20. (2) Ante, p. 885.

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to the Military Service Act, 1916, mean that with regard to those religious bodies which include among their members men in holy orders, such as the Churches of England and Rome, members of them who claim exemption under the clause must bring themselves within the words "in holy orders." But as to other religious denominations, any man who is a member of them and who claims exemption under the clause must show, in order to substantiate his claim, that he is a regular minister of the religious denomination. The latter test, however, has no application to the Church of England or to any Church which includes men in holy orders. A man who is a member of the Church of England and who claims exemption under the clause must in order to succeed show that he is in holy orders.

AVORY and BAILHACHE JJ. concurred.

Appeal allowed. Case remitted.

Solicitor for appellant: *Treasury Solicitor.*

J. E. A.

[IN THE COURT OF APPEAL.]

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July 17, 30.

HAYWARD *v.* DRURY LANE THEATRE, LIMITED, AND MOSS' EMPIRES, LIMITED.

Master and Servant—Common Employment—Mere Volunteer—Volunteer with Interest—Liability of Master for Negligence of Servant.

The defendants Moss' Empires had under agreement the use of Drury Lane Theatre for the production of a revue. The plaintiff, a principal dancer, attended rehearsals of the revue; she was under no contract with the defendants to attend them and was not paid for her attendances, but attended in the hope and expectation of obtaining an employment for the run of the revue when it was ready for production. At one of the rehearsals a staircase which formed part of the scenery was fixed upon the stage by the direction of the producer of the revue, who was a servant of the defendants Moss' Empires, in such a way as to be unsafe. The plaintiff, with others, took up a position on the staircase by the direction of the producer, when the staircase collapsed, with the result that the plaintiff sustained serious injuries, to recover damages for which she brought the present action. The jury found that the plaintiff was not in the employment of the defendants Moss' Empires, and that the accident was caused by the negligence of one of their servants, and judgment was given against Moss' Empires:—

Held, that on the facts the finding of the jury that the plaintiff was not a servant of the defendants was right; and, further, that the plaintiff was not a mere volunteer who could not be in a better position to recover damages from the defendants than their own servants, but was a volunteer in a service in which she had a common interest with the defendants, and therefore the doctrine of common employment had no application and the plaintiff was entitled to recover.

Holmes v. *North Eastern Ry. Co.* (1869) L. R. 4 Ex. 254; (1871) 6 Ex. 123 and *Wright* v. *London and North Western Ry. Co.* (1876) 1 Q. B. D. 252 followed.

Degg v. *Midland Ry. Co.* (1857) 1 H. & N. 773 and *Potter* v. *Faulkner* (1861) 1 B. & S. 800 distinguished.

APPLICATION of defendants for judgment or new trial of an action tried before Shearman J. and a common jury.

The facts are taken substantially from the judgment of the Lord Chief Justice.

Moss' Empires, Limited, were in possession of Drury Lane Theatre and were intending on June 12, 1916, to produce a revue

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called "Razzle Dazzle." For this purpose rehearsals had been proceeding for some weeks, which were attended by the plaintiff, Hilda Hayward, a professional dancer. She was not under contract with the defendants either to attend rehearsals or to perform in the proposed production. She was requested by the defendants to attend the rehearsals without payment, and she attended them for seven weeks with the object on their part of ascertaining and testing her fitness and capacity for engagement in the revue and on her part of obtaining a contract to perform in the revue when produced. Whilst attending a rehearsal on June 9 she was ordered by Wilson, the producer of the revue, in the defendants' employment, to stand on a staircase which was part of the scenery. She took her position accordingly, when the staircase, being insecurely fixed owing to the negligent orders of Wilson, collapsed and seriously injured her by crushing her ankle. The plaintiff brought this action to recover damages for her injuries and obtained a verdict and judgment for 367*l.* against Moss' Empires. Judgment was given for the defendants the Drury Lane Theatre, Limited, and the plaintiff did not appeal against that judgment. At the trial the jury found (1.) that the plaintiff was not in the employment of Moss' Empires, Limited; (2.) that the defendants did not use reasonable care to prevent damage from unexpected danger on the stage of which they knew or ought to have known; and (3.) that the injury was caused by the negligence of a person in the defendants' employment. All further questions of fact were left to the judge, who held that the plaintiff was on the stage at the request of the defendants and for the purpose of assisting them as a person whom they professed themselves willing to engage when the time came.

The defendants appealed.

Rigby Swift, *K.C.*, and *Harold Brandon*, for the defendants. In law the plaintiff must be treated as a person in common employment with the servant of the defendants through whose negligence she was injured, and therefore the action is not maintainable. The test of employment is the subjection of one person to the lawful orders and directions of another: see Eversley's Domestic Relations, 3rd ed. p. 859; and the plaintiff fulfils the requirements of that test. She cannot put her case higher than that she was a volunteer, and if she

volunteered to assist the other servants of the defendants the cases show that a volunteer is in no better position than a servant. This principle is laid down in *Degg* v. *Midland Ry. Co.* (1), which decision was approved in *Potter* v. *Faulkner.* (2) In *Holmes* v. *North Eastern Ry. Co.* (3), which at first sight looks irreconcilable with these decisions, no question was raised as to the plaintiff being a servant of the defendants; he was a man doing his own work, and common employment was not mentioned; the same remarks apply to *Wright* v. *London and North Western Ry. Co.* (4) The plaintiff was not doing work in which she had an interest, as was the case in *Holmes* v. *North Eastern Ry. Co.* (3) and in *Wright* v. *London and North Western Ry. Co.* (4); she had no interest, she had no more than a motive. At the moment of the accident she was doing something in obedience to an order. [They also cited *Johnson* v. *Lindsay & Co.* (5), *Burr* v. *Theatre Royal, Drury Lane* (6), and *Wyllie* v. *Caledonian Ry. Co.* (7)]

Rawlinson, K.C., and *Harry Dobb*, for the plaintiff. The plaintiff was not in common employment with Wilson; she was present at the invitation of Moss' Empires, and went there on an enterprise common to both. There was no legal obligation on the plaintiff to attend rehearsals or to obey orders, though it would, of course, imperil her chance of an engagement if she did not do so. It is not every person who has to conform to orders who is a servant. The plaintiff only obeyed orders in the sense in which a person going into a shop obeys them. She was not assisting but was there to see if business would come of it. The effect of having a common interest is to turn a bare licensee into a licensee with interest. *Degg* v. *Midland Ry. Co.* (1) is distinguishable. The doctrine of common employment is highly technical and ought not to be extended. [They also cited *Houghton* v. *Pilkington.* (8)]

Rigby Swift, K.C., in reply, cited *Swainson* v. *North Eastern Ry. Co.* (9)

Cur. adv. vult.

(1) 1 H. & N. 773.
(2) 1 B. & S. 800.
(3) L. R. 4 Ex. 254.
(4) 1 Q. B. D. 252.
(5) [1891] A. C. 371, 377.
(6) [1907] 1 K. B. 544.
(7) (1871) 9 M. 463.
(8) [1912] 3 K. B. 308.
(9) (1878) 3 Ex. D. 341; 47 L. J. (Q.B.) 372, 376.

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July 30. VISCOUNT READING C.J. read the following judgment: —[After stating the facts as above, his Lordship proceeded:] The defendants appeal on the ground that in law the plaintiff must be treated as a person in common employment with the servant of the defendants through whose negligence she was injured, and therefore that this action is not maintainable, and that the verdict and judgment for the plaintiff should be set aside and judgment entered for the defendants Moss' Empires, Limited. It is admitted that the plaintiff was injured by the negligence of a servant of the defendants, and no question arises with regard to the amount of the damages. The only question on this appeal is as to the right of the plaintiff to recover damages upon the undisputed facts.

If the plaintiff had been a stranger whom the defendants, for the purposes of their business, had invited to enter upon the premises, it cannot be doubted that they would be liable for the failure to use reasonable care to prevent damage to the plaintiff from unusual danger which the defendants by their servants knew or ought to know: *Indermaur* v. *Dames*. (1) But it is contended that the plaintiff is not in the position of a stranger and is to be regarded as in common employment with the servant of the defendants whose negligence caused the injury, and therefore the plaintiff cannot recover. That in fact the plaintiff was not in common employment with Wilson is beyond question, as there was no contract of service; but it is argued that she is to be regarded as in the same position as if she had been in common employment, first, because she had submitted herself to the orders of Wilson on behalf of the defendants, and, secondly, because she was a volunteer. Upon the first point the true inference from the facts is that she had not contracted to obey the orders of the defendants' servants, but that if she did not obey them she would imperil her prospects of obtaining an engagement. She was under no legal obligation to obey orders.

The second point raises a question of greater difficulty. The defendants' case rested, in the main, upon the authority of *Degg* v. *Midland Ry. Co.* (2) There the injured man was voluntarily assisting the railway company's servants in turning a truck when other servants of the railway company negligently ran a steam

(1) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(2) 1 H. & N. 773.

engine so as to cause his death. His administratrix then brought the action. It was held that the action was not maintainable. Bramwell B. said, in delivering the judgment of the Court (1): "The cases shew that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable: and it might be enough for us to say that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services, can have any greater rights or impose any greater duty on the defendants than would have existed had he been a hired servant. But we were pressed by an expression to be found in those cases to the effect that 'a servant undertakes as between him and the master to run all ordinary risks of the service, including the negligence of a fellow servant': *Wiggett* v. *Fox* (2); and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workmen, as it would be if he were paid for his services." And this decision was approved four years later by the Exchequer Chamber in *Potter* v. *Faulkner*. (3) There Erle C.J. said (4): "This is the case of one who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the consent or even the knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself in respect of their master's liability: he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ." In both of these cases the injured person had of his own initiative volunteered to assist the defendants' servants and in law was on the defendants' premises as a mere licensee. In *Holmes* v. *North Eastern Ry. Co.* (5) it was held upon the authority of *Indermaur* v. *Dames* (6) that where a plaintiff was not a mere licensee, but was engaged with the consent and invitation of the defendants in

(1) 1 H. & N. 779.
(2) (1856) 11 Ex. 832.
(3) 1 B. & S. 800.
(4) Ibid. 806.
(5) L. R. 4 Ex. 254.
(6) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

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a transaction of common interest to both parties, the defendants were liable if he was injured owing to their premises not being in a reasonably secure condition. In *Holmes' Case* (1) the plaintiff was the consignee of a coal waggon, and with the permission of the station-master went to the waggon and took coal from it. In so doing he stepped on the flagged path, which gave way and he was injured, and it was held that he was entitled to recover. The Court took the view that he was not a mere volunter; see particularly Channell B., who said (2): "... in one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word '*mere*' has a very qualifying operation. We must infer from the silence of the station-master that he acquiesced in the plaintiff's going on to the siding for the purpose of getting coal from his waggon in the way in which he did get it." This case was affirmed in the Exchequer Chamber by Cockburn C.J. and six other judges. (3) In *Wright* v. *London and North Western Ry. Co.* (4) the principle in *Holmes* v. *North Eastern Ry. Co.* (5) was approved. The plaintiff was at the station to receive a heifer which was in a horse-box of the defendants. In order to save delay he helped the defendants' servants to shunt the horse-box, and whilst so doing was injured by the negligence of the defendants' servants. The station-master knew that the plaintiff was assisting in the shunting and assented. The Court had to consider whether the case came within *Degg* v. *Midland Ry. Co.* (6) or *Holmes* v. *North Eastern Ry. Co.* (5), and decided, in the words of Lord Coleridge C.J. (7), "that the plaintiff was not acting merely as a volunteer, in which case he would have been bound to take all risks upon himself which he met with in the employment; nor was it the case of master and servant, in which case the defendants would not have been liable for the negligence of a fellow servant. But the defendants being bound by contract to deliver the heifer to the plaintiff, they, by their representative the station-master, allowed the plaintiff to take part in the delivery, and they were therefore bound to see that he did not get injured by the negligence of their servants." James L.J. said it would be a shocking state of

(1) L. R 4 Ex. 254.
(2) L. R. 4 Ex. 258.
(3) L. R. 6 Ex. 123.
(4) 1 Q. B. D. 252.
(5) L. R. 4 Ex. 254; L. R. 6 Ex. 123.
(6) 1 H. & N. 773.
(7) 1 Q. B. D. 255.

the law if a person in the position the plaintiff was could not recover, and agreed with Lord Coleridge C.J. Cleasby B., who was a party to *Holmes* v. *North Eastern Ry. Co.* (1), said (2): "He has not agreed to be the fellow-servant of the defendants' servants." In the two earlier cases there was not, as in the present case, an invitation of the defendants, and there was neither knowledge nor assent of the defendants or of any person in the position to receive it or give it on behalf of the defendants, and the bearing of these facts upon the law must be considered. It is to be observed that in neither of them did the principle of *Indermaur* v. *Dames* (3) come under consideration. The judgments in *Degg* v. *Midland Ry. Co.* (4) and *Potter* v. *Faulkner* (5) are based upon the principle that a volunteer cannot be in a better position to recover damages occasioned by the negligence of the defendants' servants whom he was assisting on his own initiation than a servant of the defendants.

On behalf of the defendants reliance was placed upon the observations made by Brett L.J. in *Swainson* v. *North Eastern Ry. Co.* (6): ". . . . in order to give rise to the exemption there must be a common employment and a common master; it is not necessary that there should be a common service for a definite time or at fixed wages; for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment; a volunteer puts himself under the control of another person, and in respect of that other person he is for the time being in the position of a servant"; and also upon *Johnson* v. *Lindsay & Co.* (7), where Lord Herschell, having quoted these observations, said (8): ". . . . a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such. This, as has been pointed out, is the position of a volunteer. But it is obvious that if the exemption results, as it does according to the authorities I have cited, from the injured person having undertaken, as between himself and the person he sues, to bear the risks of his fellow-servant's negligence, it can never be applicable when there

(1) L. R. 4 Ex. 254; L. R. 6 Ex. 123.
(2) 1 Q. B. D. 257.
(3) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(4) 1 H. & N. 773.
(5) 1 B. & S. 800.
(6) 3 Ex. D. 341, 349.
(7) [1891] A. C. 371.
(8) Ibid. 377.

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is no relation between the parties from which such an undertaking can be implied. . . . I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties." Lord Watson also held (1) that the immunity of the master in such a case rested upon an implied undertaking by the servant to bear the risks of a fellow-servant's negligence. In the present case the plaintiff has not, in my view of the facts, either expressly or impliedly undertaken as between herself and the defendants to bear the risk of the negligence of the defendants' servants. Since no contractual relation existed between the parties, I cannot see how or from what relation such an undertaking can be implied. Therefore the plaintiff was not in common employment with Wilson.

It was argued for the defendants that, even if there was no such implied undertaking, the above quoted observations of Lord Herschell showed that the plaintiff, being a volunteer, could not recover. I cannot find that these observations cast any doubt upon the decisions in *Holmes* v. *North Eastern Ry. Co.* (2) and *Wright* v. *London and North Western Ry. Co.* (3) Neither Lord Herschell nor Brett L.J. was considering the distinction between the case of a mere volunteer and one who voluntarily assisted the defendants' servants in the circumstances proved in *Holmes'* (2) and *Wright's* (3) cases.

I think the law is now well established that a *mere* volunteer cannot be in a better position to recover damages from the master for injury caused by the negligence of the master's servants than the servants who are under contract of service with the master. *Holmes* v. *North Eastern Ry. Co.* (2) and *Wright* v. *London and North Western Ry. Co* (3) show that there is a distinction to be made when the injured person voluntarily assists the master's servants in a service in which he has a common interest with the master and by the invitation or with the acquiescence of the master or his servant acting within the scope of his employment. He is not a mere volunteer and can recover if he is injured by the negligence of the master's servants.

(1) [1891] A. C. 382.
(2) L. R. 4 Ex. 254; L. R. 6 Ex. 123.
(3) 1 Q. B. D. 252.

The present case falls within the principle of the decisions in the last-mentioned cases, which show that the action by the plaintiff against Moss' Empires, Limited, is maintainable. Nothing that I have said is, in my opinion, in conflict with the true principle of the decisions in *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner*. (2) I should have been sorry had I been constrained by precedents to hold that the plaintiff could not recover against the defendants. The doctrine of common employment has been much discussed and criticized; its importance in the legal relation of master and servant has, however, been considerably reduced since Parliament passed the Workmen's Compensation Acts, but I do not think that it extends to cover such a case as the present. In my judgment this appeal should be dismissed with costs.

SCRUTTON L.J. read the following judgment:—Moss' Empires, Limited, who were intending to produce a revue called "Razzle Dazzle" at Drury Lane Theatre, appeal against a judgment of Shearman J., after trial with a common jury, awarding Hilda Hayward damages for injury to her ankle during the rehearsals for the revue. In my view there are really no facts in dispute, but only legal inferences from admitted facts.

The appellants contend that the injury was caused by the negligence of their servants, and that the plaintiff was in common employment with the negligent servants. As no personal negligence is imputed to them in selecting servants, they contend that the doctrine of common employment prevents their being liable to the plaintiff.

The respondent answers that the plaintiff was never in the employment of the defendants, and that therefore the doctrine of common employment does not apply. She alleges that she was an invitee or licensee with an interest, and that she has been injured by a defect in the nature of a trap, for which the defendants are liable.

The undisputed facts appear to be that the defendants not only do not pay for service at their rehearsals, but also do not make any contract binding their artistes to attend at rehearsals. They find people are ready to rehearse on the chance of an engagement for the piece, while this affords them an opportunity of testing the

(1) 1 H. & N. 773. (2) 1 B. & S. 800.

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capacity of the candidate. The result appears to be that there is no contract of service between the plaintiff and the defendants. The actress need not attend at any day or hour, or obey any order given her. She will break no contract if she is absent or disobedient, though she thereby imperils or forfeits her chance of getting a contract hereafter. The management can order her to leave the theatre at any minute, or refuse her an engagement, without any breach of contract on their part. They pay her nothing. Unless authorities compel me to hold the contrary, I cannot see that there is any contractual relation, or relation of master or servant, between the actress and the company. The real legal relation appears to be this: The actress is in the theatre by the licence or invitation of the company; she has an interest in the matter in that she hopes her performance at rehearsal will get her a permanent engagement; they have an interest in the matter in that they are able to test her abilities, and the piece, as cheaply as possible. Both parties contemplate a possible contractual relation in the future, but are under no present contractual relation.

What happened to her was that at a rehearsal she amongst other actresses had to stand on a built-up staircase. This was built and erected by servants of the company. At this particular performance part of the staircase was left out, though the resulting danger was not obvious to the performers. The actresses stood on the staircase; it collapsed, and the plaintiff's ankle was injured. The position is the same as if she had stood on a trap-door insecurely fastened underneath, though the defect was not obvious to those above. The jury found that Moss' Empires, Limited, did not use reasonable care to prevent damage from unexpected danger on the stage of which they knew or ought to have known, and that the injury was caused by the negligence of a person in their employment, and I do not understand there is any quarrel with these findings. They also found that the plaintiff was not in the employment of Moss' Empires, Limited.

If there were any dispute as to the facts, I cannot think the jury received sufficient direction on the first question. The learned judge's summing-up as reported mixes up the common law liability and the liability under the Workmen's Compensation Act in such a way as to fail to enlighten, if not to mislead, any jury ignorant of the

law. But as the facts are not really in dispute, the only question is one for the Court whether those facts give rise to such a legal relation as to introduce the doctrine of common employment. It is said the authorities bind us to take this view. Though part of the operation of the doctrine of common employment has been swept away by the Workmen's Compensation Act, the doctrine itself is too firmly established in our law to be disturbed except by further legislation. The doctrine applies to release a master from liability to his servant for damage done by the negligence of a fellow-servant, because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes in entering into his employment. This is the explanation given by Blackburn J. in *Howells* v. *Landore Steel Co.* (1) and approved by Lord Watson in *Johnson* v. *Lindsay & Co.* (2) Lord Herschell in the same case (3) implies it from the legal relation between master and servant, which is necessary for its existence. Bramwell L.J. in *Swainson* v. *North Eastern Ry. Co.* (4) justified it either as an undertaking or contract by the servant to bear the risks of his employment, or a failure to stipulate that the master shall be liable for the negligence of fellow-servants. The very careful explanation of the doctrine by Shaw C.J. in the American case of *Farwell* v. *Boston and Worcester Railroad Corporation* (5) puts it on a similar ground: "that the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied." If it were profitable to criticize it, one would ask why such an undertaking should be implied to bear the risks of the negligence of fellow-servants but no undertaking to bear the risks of the master's negligence.

It has, however, been clearly held that the risks undertaken are not those of common employment—that is, those of the negligence of a man with whom you are going to work in concert—unless the master is the common employer of both of the servants: *Johnson* v.

(1) (1874) L. R. 10 Q. B. 62, 64.
(2) [1891] A. C. 371, 387.
(3) [1891] A. C. 378.
(4) 47 L. J. (Q.B.) 374.
(5) (1842) 45 Mass. 49, 60; 3 Macq. 316, 320.

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Lindsay & Co. (1); *Swainson* v. *North Eastern Ry. Co.* (2) For the other servant in common employment may have no necessary connection with the master, and there is no need to make an implication as to his negligence, unless he has such a connection, so that the master may be liable for his acts in the course of his employment. The doctrine then is an implication from a legal relation between master and servant, as stated by Lord Herschell in *Johnson* v. *Lindsay & Co.* (1)

It is not surprising that the question arose as to what was the position of a volunteer. In 1857 the case of *Degg* v. *Midland Ry. Co.* (3) was decided by the Court of Exchequer. In that case a carman of Pickford's, seeing some servants of the railway company trying to move a turntable, of his own accord ran to help them, and was injured by an engine of the company. This case was considered in the Exchequer Chamber in 1861 in *Potter* v. *Faulkner* (4), in which case a carman waiting to receive goods for A. from a warehouse belonging to B. was asked by a carman of B.'s to help him stow some goods to be carried to C.; he did so, and while helping was injured by the negligence of other servants of B. In neither case, it will be noticed, did the master know or approve of the assistance rendered by the plaintiff, and in *Degg* v. *Midland Ry. Co.* (3) the assistance was rendered without the request of the master's servants. In *Degg's Case* (3) Bramwell B. held that the defendant, by volunteering his services, could not get any greater rights or impose any greater duty than would have existed had he been a hired servant. He also held there was a similar undertaking to bear risks implied in the case of such a volunteer. The greater part of his judgment is devoted to the view that there is no liability in tort to a trespasser or wrongdoer by a master for negligence of his servants, though the master himself might be liable for negligence if he knew the trespasser was there and carelessly injured him. The Exchequer Chamber in *Potter* v. *Faulkner* (4) affirmed "the principle of" *Degg's Case* (3), which Erle C.J. put in this way (5): "This is the case of one who volunteers to associate himself with the defendants' servant in the performance of his work, and that without the consent or even the

(1) [1891] A. C. 371.
(2) 3 Ex. D. 341; 47 L. J. (Q.B.) 372.
(3) 1 H. & N. 773.
(4) 1 B. & S. 800.
(5) 1 B. & S. 806.

knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself in respect of their master's liability."

These cases seem explicable on the ground that the volunteer is as regards the master a trespasser, and cannot claim a higher protection than that the master himself shall not wilfully or carelessly injure him. He cannot make the master liable for negligent acts of his servants, as their duties to the master do not include taking care of trespassers. The difficulty of implying the undertaking spoken of by Bramwell B. is that there is no contract or legal relation between the master and volunteer in which the undertaking can be implied. Sir F. Pollock on Torts, 10th ed., p. 111, treats these cases as applications of the principle " volenti non fit injuria."

Some years afterwards two more cases showed the difficulties involved in some of the language used in the former cases. In 1868 in *Holmes* v. *North Eastern Ry. Co.* (1) a consignee going with permission of the station-master to get coal from his waggon on the defendants' premises, work which the defendants should do by contract, was injured by a trap in the shape of a defective flagstone. He was held to be a licensee, but not a mere licensee, a licensee with a common interest with the licensor, and as such entitled to be warned of traps. Nothing was said about the doctrine of common employment. In *Wright* v. *London and North Western Ry. Co.* (2) a consignee helped the railway porters, with the assent of the station-master, to discharge his heifer, and was injured by a train negligently allowed to come out of the siding. It was argued on the one hand that he was a volunteer who within *Degg* v. *Midland Ry. Co.* (3) had undertaken the risk, on the other that he was a licensee with an interest within *Holmes* v. *North Eastern Ry. Co.* (1) It was held the plaintiff was neither a volunteer nor a servant, but an invitee, with regard to whom the company must by their servants use reasonable care.

There are, however, two opinions of weight which must be considered. Both arose in cases where it was endeavoured to extend the doctrine of common employment to cases where the servants were engaged in the same work though under different masters. In

(1) L. R. 4 Ex. 254; L. R. 6 Ex. 123.

(2) 1 Q. B. D. 252.

(3) 1 H. & N. 773.

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Swainson v. *North Eastern Ry. Co.* (1) Brett L.J. says: "In all the cases there is a common employment, and work done in common by servants under a common master. The cases show that both those conditions, or something equivalent to both, is necessary to raise the exception to the general rule of liability. We cannot say that the common service required is necessarily a common service arising out of a binding contract to serve for a definite time, or on which the complainant is to receive wages; for there are cases of volunteers, and other cases in which there is certainly no contract and no payment in virtue of one. But when the volunteer cases are looked at it will be found that they are all cases of volunteering to *serve;* in which the complainant put himself voluntarily under the control and order of the defendant as his master; therefore, though not a paid servant, by his voluntary act he puts the defendant in possession of his services, and makes him unsuable so long as he chooses to remain under such orders and control, and so becomes a servant of the defendant." It will be noticed that the learned judge is meeting the argument that a contract of service is not necessary, because of the volunteer cases, by saying that the volunteer has offered to serve the master. I do not see how this can make any contract of service with a master who does not know of the voluntary offer, still less with a master who knows of the offer and refuses to make a contract. Cotton L.J. says (2): "If the injured man is a volunteer, and is acting as a servant when injured, it is well established that he cannot recover against the head of the establishment; but then he puts himself in the same position as if he were actually a servant, and there is the same implied contract, because he has put himself in the same relation." Here again the learned judge speaks of the relation as a contract implied from a relation; and I cannot see how you can imply a contract with a person who is ignorant of the voluntary service. Both these passages, though entitled to the greatest respect, were obiter dicta not necessary for the decision. The same question of common employment was raised in *Johnson* v. *Lindsay & Co.* (3) Lord Herschell explains the position of volunteers thus (4): "These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant

(1) 47 L. J. (Q.B.) 372, 376.
(2) 47 L. J. (Q.B.) 377.
(3) [1891] A. C. 371.
(4) Ibid. 377.

can shew that the person so seeking to make him liable was himself in his service, the defence of common employment is not open to him. Such service need not, of course, be permanent or for any defined term. The general servant of A. may for a time or on a particular occasion be the servant of B., and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such. This, as has been pointed out, is the position of a volunteer." This again is obiter dictum, and indeed the learned Lord goes on: "the exemption can never be applicable when there is no relation between the parties from which such an undertaking can be implied. . . . . I do not see how such an obligation can arise otherwise than from some contractual relation."

As I have said, I cannot see how a contractual relation can be implied between a volunteer and a master ignorant of his volunteering. It appears to me that while *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner* (2) are rightly decided, they are right for the reasons given by Bramwell B. that a trespassing volunteer cannot complain, against the employer ignorant of his presence, of the negligence of that employer's servants on the ground of tort, justified by the reason given by Erle C.J. that to do so would be to allow him to put himself without the consent of the employer in a better position than the servants whom the employer consented to employ on the work on to which the volunteer trespassed. I think it is not correct to base them on any contractual relation.

In the case before us the employer knew of the volunteer's presence and action and of set policy declined to make a contract with her. I do not see after this how he can avail himself of a protection which, as Lord Herschell says, can only be implied from a contractual relation. But he has invited the volunteer to be present, and licensed her remaining to endeavour to obtain a contract. This appears to me to impose on him a liability for tort.

I understand that liability to be this. A bare or mere licensee, one who has no common interest with the owner of the premises but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid by reason-

(1) 1 H. & N. 773. (2) 1 B. & S. 800.

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able care and skill. The owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them: see the judgment of Willes J. in *Gautret* v. *Egerton*. (1)

A licensee who is on premises on the business of the owners, or with a common interest with them, is not a bare or mere licensee, but a licensee with an interest, and has the same rights as an invitee: see *Holmes* v. *North Eastern Ry. Co.* (2); *Wright* v. *London and North Western Ry. Co.* (3)

In stating the rights of an invitee one must separate those cases where the person using the premises does so for payment. The owners in such a case are bound to see that the premises are reasonably safe, and if they are not safe, and the owners could know of the dangerous condition and negligently did not know of it, they are liable for damages caused: *Mersey Docks Board* v. *Gibbs* (4); *Parnaby* v. *Lancaster Canal Co.* (5) This latter case is treated by Hamilton L.J. in his very instructive judgment in *Latham* v. *Johnson* (6) as a case applying to invitees generally. It seems to me to be a case of an invitee for payment.

The rights of an invitee who does not pay for his presence are stated in *Indermaur* v. *Dames* (7), and are that the owner of premises must use reasonable care to protect him either by warning or precaution against traps, whether existing or new, dangers which the licensee, if ignorant of the premises, could not avoid by reasonable care and prudence. Against dangers which are not traps in this sense the owner is under no liability—that is, he does not warrant the premises safe or as safe as reasonable care could make them.

The difference between the bare licensee and the invitee or licensee with an interest is that as to existing traps the owner incurs liability to the latter and not to the former. The liability towards a trespasser is fully discussed by the Court of Appeal in *Lowery* v. *Walker*. (8)

If this statement of the law is correct, the volunteer in *Degg* v.

(1) (1867) L. R. 2 C. P. 371.
(2) L. R. 4 Ex. 254; L. R. 6 Ex. 123.
(3) 1 Q. B. D. 252.
(4) (1866) L. R. 1 H. L. 93, 104.
(5) (1839) 11 Ad. & E. 223.
(6) [1913] 1 K. B. 398, 412.
(7) L. R. 1 C. P. 274; L. R. 2 C. P. 311.
(8) [1910] 1 K. B. 173.

Midland Ry. Co. (1) and *Potter* v. *Faulkner* (2) was a trespasser and the owner had no liability for any negligence of his servants, without the need of implying a contractual relation, which I cannot think existed. The plaintiff in the present case was either a licensee with an interest or an invitee, as Shearman J. found, and was as such entitled to be protected against traps. A trap, in my view, is none the less a trap that it begins by an act of negligence and continues so by an act of negligence if its continuing condition is a danger which the licensee cannot avoid by reasonable care. The jury in this case have found there was danger unexpected to the plaintiff on the stage, which the defendants by their servants ought to have known of and prevented, and there was evidence on which they could come to this finding. If there had been a contractual relation between plaintiff and defendants, the plaintiff would on the authorities have impliedly taken the risk of negligence of fellow-servants in creating such a danger, in the absence of personal negligence of the defendants or negligent failure on their part to appoint competent servants. There being no contractual relation on the admitted facts, this implication cannot be made, and the plaintiff has the ordinary protection of an invitee and can in my opinion recover.

On these grounds, in my opinion, the appeal fails and should be dismissed with costs.

NEVILLE J. read the following judgment:—The doctrine of common employment appears to me to be a purely arbitrary and artificial rule founded upon neither principle nor (prior to 1837, according to Lord Watson) authority (see *Johnson* v. *Lindsay & Co.* (3))—a mere excrescence upon the common law, devised, apparently, for the purpose of exempting a particular class from an otherwise universal liability. The best to be said for it probably is that it was considered at the time of its invention to be in furtherance of public policy, inasmuch as the application of the law as it stood to the case of masters might operate to the discouragement of the employment of labour. The rule, however, is to-day established beyond question and cannot be disregarded by the Court.

(1) 1 H. & N. 773. (2) 1 B. & S. 800.
(3) [1891] A. C. 383.

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It remains to consider whether the doctrine is applicable where the services rendered by the injured person are voluntary. There are dicta of eminent judges, for whose opinion I entertain the most profound respect, in the affirmative. I gather from the cases cited that this extension of the doctrine is thought to be established by the cases of *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner* (2); with these cases I will deal later.

The extent of the rule is plainly stated by Lord Herschell in the case of *Johnson* v. *Lindsay & Co.* (3), and it is there stated to extend to volunteers, though that extension was not necessary for the decision. It is at the same time said (4) to rest upon some contractual relation, so that in the case of volunteers we are at once faced by the amorphous conception of a contractual relation arising in the absence of a contract. To say that parties bear a contractual relation to one another where no contract exists between them is to my mind to state a legal paradox. The idea that the doctrine of common employment extends to the case of volunteers appears, as I have said, to depend mainly upon the cases of *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner.* (2) In neither of those cases was there any consideration for the acts done by the injured person, and both appear to have been accepted as instances of the application of the doctrine of common employment. Indeed the language of the judgments in those cases lends itself to such a construction. But even if the phrase "contractual relation" is extended beyond its extreme limit so as to cover the case of a voluntary relation, which would have been contractual had there been any consideration to support it, it will not fit the facts in either of those cases. In neither case was there any relation at all between the master and the injured person beyond that which arose from the gratuitous interference of the latter with the master's business. There was no invitation to do the acts by the master or by any person having his authority.

Applying the law, therefore, as laid down in *Johnson* v. *Lindsay & Co.* (5), there being no contractual relation between the master and the injured person either real or supposititious in either of

(1) 1 H. & N. 773.
(2) 1 B. & S. 800.
(3) [1891] A. C. 371, 377, 378, 380.
(4) [1891] A. C. 378.
(5) [1891] A. C. 371.

those cases, they must both be excluded from the operation of the doctrine of common employment. They do not come within the definition of the rule and yet are relied upon for the extension of the rule to volunteers: a somewhat remarkable result.

In my opinion, in both *Degg* v. *Midland Ry. Co.* (1) and *Potter* v. *Faulkner* (2) the true ground for the decisions, or at all events a ground upon which both cases can be supported, is not the application to them of the doctrine of common employment at all. In both cases the injured person when the accident happened was interfering voluntarily and officiously with the affairs of another, and it seems to me consistent both with law and good sense (which in the main are identical) to hold that in such circumstances the injured person can have no legal claim against the master of the servant whose negligence occasioned the accident. It seems to me that in such a case the master could answer the claim conclusively by saying, "You meddled in what was no business of yours. You interfered with my property without any invitation from me. In so doing you acted illegally, and that can give you no claim against me."

As at present advised, having regard to the decisions to which our attention has been called, I am not satisfied that the doctrine of common employment extends to cases where there is in fact no contractual relation between the master of the negligent servant and the injured person.

The dicta of other judges afford valuable assistance to a judge in the determination of the case before him, but in my opinion he is not bound, and therefore certainly not entitled, to follow the dictum of another judge, however eminent, unless it accords with his own judgment, which I think, in the absence of binding authority, he is bound to exercise.

I do not think, however, that the question I have dealt with necessarily arises in the present case.

The cases of *Holmes* v. *North Eastern Ry. Co.* (3) and *Wright* v. *London and North Western Ry. Co.* (4) differentiate from cases coming within the rule cases where the master and the injured

(1) 1 H. & N. 773.
(2) 1 B. & S. 800.
(3) L. R. 4 Ex. 254; L. R. 6 Ex. 123.
(4) 1 Q. B. D. 252.

C. A. 1917

HAYWARD v. DRURY LANE THEATRE AND MOSS' EMPIRES.

Neville J.

person have what has been called a common interest in the transaction in the course of which the accident happens. I do not think, speaking with deference, that "common interest" is a phrase happily chosen to represent what appears to me to have been the ground of decision in those cases. In the first the accident happened while the plaintiff was seeking delivery of his own coal, in the second of his own calf. In both cases the plaintiff was pursuing his own business and seeking to advance his own interests exclusively. Any benefit that the defendants might derive from his action was purely incidental. That appears to me in each case to be the true ground of the decision; subject to what I have said above with regard to the effect of absence of consideration, the question in each case appears to me to be, was the injured person acting for himself and for his own interests, or was his action intended for the benefit of the master. Applying this test to the facts of the present case, it appears to me that the plaintiff was acting on her own account and in furtherance of her own interests alone. She desired to obtain an engagement, and attending the rehearsals as desired by the defendants appeared to her the best means of obtaining one. If she had gone to the office of the manager of the theatre to apply for an engagement, and in obedience to his desire had accompanied him to the stage to exhibit her dancing in the hope of inducing him to employ her and had then been injured by a servant of the defendants, could it be successfully contended that she was engaged upon any business but her own or in any sense of the word, however extended, in their employment? I am unable to draw any sound distinction between that case and the case proved by the plaintiff here. The jury have found that she was not in the employment of the defendants, and I think they were amply justified by the evidence in so finding. If it be an inference of law, I come to the same conclusion.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *J. F. Spencer Cridland.*
Solicitors for defendants: *William Hurd & Son.*

W. J. B.

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